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Interregulation of Oligopolistic Markets

Finnish Merger Control in View of EU Merger Regulation and EU Case Practice

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Julkaisun nimike
Oligopolististen markkinoiden interregulaatio – Suomen yrityskauppavalvonta EU:n keskittymäasetuksen ja ratkaisukäytännön valossa

Tiivistelmä
Tutkimuksessa selvitetään, millä tavoin EU:n yrityskauppavalvonnan kehitys on vaikuttanut Suomen yrityskauppavalvonnan kehitykseen oligopolistisilla markkinoilla. Tutkimuksen kohteena on siten niin sanottu interregulaatio, jolla tarkoitetaan tässä tutkimuksessa yrityskauppasäännösten ja tapauskäytännön välistä keskinäistä riippuvuutta eri regiimien välillä. Tutkimuksen painopistealueena on yrityskauppojen kilpailuvaikutusten arviointikriteerit ja niiden kehitys. Arviointikriteerejä tarkastellaan tutkimalla yrityskauppavalvontaa koskevia sääntöjä, lain esitöitä, suuntaviivoja ja ratkaisukäytäntöä.

Yrityskauppojen arviointikriteerien kehitys on siirtynyt rakenteellisesta lähestymistavasta käyttäytymistä painottavampaan peliteoreettiseen lähestymistapaan. Arviointikriteerien kehitys on tutkimuksessa jaoteltu tarkasteltavien yrityskauppatapausten perusteella kolmeen erilaiseen vaiheeseen: i) arviointikriteerien monimuotoisuus, ii) arviointikriteerien formalisointi ja iii) arviointikriteerien vakiinnuttaminen. Jaottelu antaa mahdollisuuden tarkastella arviointikriteerejä systemaattisesti. Eri kehitysvaiheiden vedenjakajana voidaan pitää EU:n ensimmäisen asteen tuomioistuimen (nykyisin yleinen tuomioistuin) ratkaisua asiassa T-342/99 DEP *Airtours plc v Commission*. Kyseisessä ratkaisussa tuomioistuin antoi kolme välttämätöntä ehtoa yhteisen määräysvallan toteamiseksi (niin sanotut *Airtours*-kriteerit).

Interregulaation osalta tutkimuksessa todetaan, että EU:n yrityskauppavalvonta on merkittävästi vaikuttanut Suomen yrityskauppasääntöjen tulkintaan ja täytäntöönpanoon. EU:n yrityskauppavalvonnan kehitys voidaan siten nähdä Suomen yrityskauppavalvonnan kehityksessä. Kriteerit ja niiden painotus muuttuvat kuitenkin edelleen. EU:n tuomioistuin on myöhemmin todennut muun muassa, että *Airtours*-kriteerien erillistä, mekaanista tarkastelua tulee välttää. Nähtäväksi jää, kuinka mahdollinen tuleva kehitys EU:ssa vaikuttaa Suomen yrityskauppavalvonnan kehitykseen.

Asiasanat
oligopolistiset markkinat, interregulaatio, kilpailuoikeus, yrityskauppavalvonta

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Abstract

The study examines how the development in EU merger control has affected the development in Finnish merger control in oligopolistic markets. Hence, the objective of the study is interregulation which, for the purposes of this study, refers to the interdependence of the merger control provisions and case practice between different regimes. The focus is on the assessment criteria and the development of the said criteria. The assessment criteria are examined by studying the merger control provisions, preparatory legislative works, merger guidelines and case practice.

The assessment criteria have moved from a structure-based approach to a more behavioural, game-theoretic approach. The study identifies three different phases of the development of the assessment criteria based on the findings of the selected merger cases: i) the diversity of the assessment criteria, ii) the formalization of the assessment criteria and iii) the stabilisation of the assessment criteria. This division provides an opportunity to examine the assessment criteria in a systemised way. The judgment of the Court of First Instance (currently the General Court) in Case T-342/99 DEP *Airtours plc v Commission* can be considered as a watershed in different phases of the development of the assessment criteria. In this judgment, the Court adopted three necessary conditions for the finding of collective dominance (so-called Airtours criteria).

As regards the question of interregulation, the study shows that EU merger control has significantly affected the interpretation and enforcement of the Finnish merger provisions. The development of EU merger control can thus be seen in the development of Finnish merger control. However, the criteria and their emphasis are subject to changes. The Court of Justice has later stated, for example, that in applying the *Airtours* criteria it is necessary to avoid a mechanical approach involving a separate verification of each of the criteria taken in isolation. It will be seen how the tentative future development in the EU will affect the development in Finnish merger control.

Keywords
oligopolistic markets, interregulation, competition law, merger control

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Abbreviations

CFI	Court of First Instance
CMRL	Common Market Law Review
CR	Concentration Ratio
EC	European Community
ECJ	European Court of Justice
ECN	European Competition Network
EU	European Union
DOJ	Department of Justice
FCA	Finnish Competition Authority
FCCA	Finnish Competition and Consumer Authority
FTC	Federal Trade Commission
FY	Fiscal Year
HHI	Herfindal-Hirschmann-Index
HSR	Hart-Scott-Rodino Antitrust Improvements Act
ICN	International Competition Network
MEE	Ministry of Employment and the Economy
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal
PPD	Published Prices for Dealers
SCP	Structure-Conduct-Performance
SLC	Substantial Lessening of Competition
SO	Statement of Objections
SSNIP	Small but Significant Non-transitory Increase in Prices
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on European Union
US	United States

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1 INTRODUCTION

1.1 Background

According to economic theory, markets have a tendency to concentrate. One type of concentrated markets is termed oligopolistic markets. Oligopolistic markets refer to a market structure which is characterized by a limited number of firms and the existence of barriers to entry. The main characteristic of oligopolistic markets is that firms' behaviour regarding output and price influences the market outcome and may therefore provoke reactions from other firms.[1] In other words, firms in oligopolistic markets are interdependent.[2]

Oligopolistic markets as such are not considered anti-competitive. The outcome in these markets may result in anything between a monopoly and perfect competition.[3] The competition authority is requested to make a distinction between behaviour which is peculiar to the oligopolistic market structure, sometimes also termed oligopolistic interaction, and coordination which results in collusive outcome and leads to price increases. This requires an understanding of an inherent tension between competition and collusion in oligopolistic markets[4] as well as tools to assess the effects of a merger on competition in these markets.

A benchmark against which the effects of a merger on competition is set, is provided in the substantive test. In Finland, the Finnish Competition and Consumer Authority (hereinafter the FCCA, previously the Finnish Competition Authority, FCA)[5] assesses under the so-called SIEC test[6], whether a concentration[7] would significantly impede effective competition, in particular as

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[1] Peeperkorn (1999), p. 24. OECD, Competition Enforcement in Oligopolistic Markets, Issues Paper by the Secretariat, DAF/COMP(2015)2, p. 3; Whish and Bailey (2012), p. 561.

[2] EU Horizontal Merger Guidelines, para. 25, footnote 29.

[3] For the main conditions of pure monopoly and pure competition, see e.g. Oinonen (2010), pp. 38-39.

[4] Clarification of the control of collective dominance was required, e.g. in the Green Paper on the Review of the Merger Regulation, COM 96(19) final (hereinafter Commission, Green Paper 1996)

[5] The Finnish Competition Authority and the Finnish Consumer Agency were merged on 1 January 2013 into the Finnish Competition and Consumer Authority.

[6] The term SIEC derives from the "significant impediment to effective competition".

[7] Similar to EU merger control, the concept of concentration covers a various types of transactions such as mergers, acquisitions and certain joint ventures. For the

a result of the creation or strengthening of a dominant position. In the affirmative, the FCCA will intervene in the merger. This assessment is carried out by examining a certain type of criteria.

The assessment of the effects of a merger on competition in oligopolistic markets is challenging. On the one hand, firms in oligopolistic markets may fiercely compete against each other on all important parameters of competition, such as price, quality, and innovation. On the other hand, under certain market conditions competition may be replaced by coordination.[8] These two situations must be separated and, therefore, the criteria are needed based on which the effects of a merger on competition can be assessed. The assessment is complex. Some of the factors may suggest the likelihood of coordination whereas others may suggest the opposite. The factors may also contradict in a single case.

The merger control in Finland has been affected by the EU Merger Regulation and the guidance related to the Regulation as well as EU case practice. The term case practice refers both to the decision practice of the competition authorities and the case law of the courts. There are a number of reasons for this development in Finland. Firstly, merger control provisions were adopted in Finland almost ten years after being adopted in the EU.[9] By that time there was already an established case practice in the EU that provided guidance for the application of national merger control provisions in Finland. Secondly, the preparatory legislative works *(travaux préparatoires)* and case law explicitly request the national competition authority to seek guidance from the EU for the application of merger control provisions in Finland. Thirdly, both the preparatory legislative works and case law in Finland refer to the convergence between the national and EU competition laws.

In Finland, the Competition Act (948/2011) entered into force on 1 November 2011, replacing the Act on Competition Restriction (480/1992), amended on 1

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purposes of this study the concept of merger is applied in order to describe a transaction where control is changed either through a merger or an acquisition or through establishing a so-called full-function joint venture. A distinction between the concepts of merger and acquisition is made in some cases discussed in this study in order to decribe the exact nature of the transaction. However, sometimes the exact nature of a transaction may be unclear. This is especially true in those cases where holding companies are involved. As regards the substantive appraisal, the distinction between the concepts of concentration, merger and acquisition is not of relevance. The concepts are also often used interchangeably

[8] Peeperkorn (1996), p. 1.

[9] The old Merger Regulation was adopted in the EU in 1989 and the merger control provisions were adopted in Finland in 1998.

May 2004 (318/2004).[10] One of the major changes brought about by the Competition Act was the change of the substantive test. The dominance test, which prevailed since the adoption of the first Finnish merger provisions in 1998, was changed into the SIEC test, which measures the significant impediment to effective competition. The SIEC test is applied, among other things, in the EU and in almost all member states. The change of the test also increased the convergence between the national merger control provisions and the EU merger control provisions. A similar type of test, i.e. the so-called SLC test, which measures the substantial lessening of competition, is applied in the US.

If the merger will significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position, the FCCA will either clear the merger subject to conditions or seek a prohibition before the Market Court. The emphasis of the SIEC test is on the effects of a merger on competition[11]. Under the SIEC test, the FCCA is no longer required to establish a dominant position possessed by a single firm, i.e. single dominance, or by a number of firms in a market characterised by an oligopolistic structure, i.e. collective dominance.[12] In addition, the SIEC test eliminated uncertainty regarding whether the merger control provisions apply to mergers that do not lead to a dominant position but may nevertheless lead to non-coordinated behavior of firms in oligopolistic markets.[13]

In Finland, oligopolistic markets have often been subject to competition law enforcement. For example, a number of mergers subject to a detailed investigation and a conditional approval as well as a number of antitrust cases, i.e. cartels and abuses of dominant positions, have concerned oligopolistic markets. In addition, a recent amendment to the Competition Act (948/2011) provides an example of addressing problems arising from an oligopolistic market structure by legislative action. By the amendment a sector-specific threshold of 30% was established in the grocery retail markets for finding a dominant position. In accordance with the amendment, the prohibition of abuse of a

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[10] The Government Bill on the new Competition Act was passed by the Finnish Parliament on 12 August 2011.

[11] Finnish Competition Authority (FCA) Guidelines on Merger Control, Guidelines on the Application of the Competition Act, 1/2011 (hereinafter the Finnish Merger Guidelines), p. 60.

[12] The concepts of collective dominance and oligopolistic dominance, as well as joint dominance can be used interchangeably. See, e.g. Lexecon Competition Memo, The Airtours Case, 12 November 1999.

[13] Finnish Merger Guidelines, p. 61.

dominant market position can be applied to firms whose national market share in grocery retail markets exceeds 30%.[14]

While the significance and the long-term effects of mergers are recognised, a vast majority of mergers are still either neutral or beneficial. Mergers may, for example, provide economies of scale that remain otherwise unattainable.[15]

1.2 Objective of the Study

The objective of the study is to examine the integration of the EU Merger Regulation [16] and EU case practice into Finnish merger control regarding oligopolistic markets. The focus is on the assessment criteria and the development of the said criteria from a structural approach to a more behavioral approach. Of particular interest is whether the approach adopted will complement, change or confirm an earlier approach and, furthermore, whether certain decisive criteria that will form a core for the assessment can be identified.

An important concept of the study is interregulation.[17] For the purposes of this study, the concept refers to the interdependence of the merger control provisions and case practice between different regimes.[18] The focus here is on the EU and

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[14] FCCA Press Release, "Competition Act Provision on Grocery Trade Became Effective on 1st of January", 2 January 2014. As regards retail sector, the President of the European Commission, Jean-Claude Juncker stated a need for breaking some retail oligopolies. See Juncker (2015), "State of the Union 2015: Time for Honesty, Unity and Solidarity", Speech of 9 September 2015, Strasbourg.

[15] Dunning (1994), pp. 21-24.

[16] Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings, OJ 2004 L 24/1-22 (hereinafter the EU Merger Regulation); Council Regulation (EEC) No 4064/89 of 21 December 1989 on the Control of Concentrations between Undertakings, OJ 1989 L 395/1-1, corrigendum, OJ 1990 L 257/13; amended by Council Regulation (EC) No 1310/97 of 30 June, OJ 1997 L 180/1-6, corrigendum, O J 1998 L 40/17 (hereinafter the old Merger Regulation).

[17] The concept of interregulation has been applied, e.g. in the context of European integration and globalization. For this description see, e.g. Ziller (2004). In Finland, the concept was launched by Professor Vesa Annola at the University of Vaasa. The use of the concept is, however, not established.

[18] Here, the concept refers to as the interdependence between the Commission and the member states as well as the interdependence between the member states. For the interdependence between the Commission and the member states, see e.g. Monti (2014). It could be argued that the interregulation results in convergence between different regimes. The aim to achieve convergence e.g. between the EU and member states is explicitly stated, e.g. with regard to the application of antitrust rules under Regulation 1/2003.

Finnish merger control regimes.[19] Furthermore, interregulation is analysed from the perspective of Finnish merger control, i.e. how the development in EU merger control has affected the development in Finnish merger control, in particular merger assessment in oligopolistic markets. In this study, interregulation manifests itself in one direction, i.e. from the EU level to the national level. Interregulation is further strengthened by economic theories regarding oligopolistic markets, i.e. assumptions about concentrated markets and the behaviour of firms in these markets, which will form a common basis for merger provisions and the assessment criteria in these regimes. The role of economics in the merger assessment is discussed in detail in chapter 3.

The concept of interregulation has also been used to describe the multiple level of decision-making by a number of competent public authorities in different sectors.[20] This description, however, is too narrow for the purposes of this study. Also the concept of legal transplant which describes the adoption of legal rules from one regime to another, is too narrow for the purposes of this study.[21] As interregulation may manifest itself as a voluntary alignment of national merger control provisions and case practice into the development of the EU Merger Regulation and guidance related to the Regulation as well as EU case practice, it could also be termed soft convergence. However, soft convergence may not necessarily cover a situation where the preparatory legislative works and case law explicitly request the national competition authority to seek guidance from the EU. Therefore, for the purposes of this study the concept of interregulation is considered best describing the interdependence between the EU and Finnish merger control regimes and the resulting development in Finnish merger control.

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[19] A similar type of interregulation can be identified – at least at the level of merger control provisions and the guidelines – in other member states, such as Germany, the United Kingdom and France. In Germany, the SIEC test is provided in Article 36 of the German Act against Restraints of Competition. For its application, see e.g. Bundeskartellamt Guidance on Substantive Merger Control of 2012. In France, the SIEC test is provided in Article L430-6 of the Commercial Code. For its application see, e.g. Autorité de la Concurrence, Merger Control Guidelines. The UK applies the SLC test that is similar to the SIEC test. For the application of the SLC test, see e.g. UK Merger Assessment Guidelines of 2010.

[20] See, e.g. Ziller (2004). This description of interregulation could be used, e.g. for examining the enforcement of the antitrust rules under Regulation 1/2003. Here, the national competition authorities and the courts have parallel competence with the Commission and the EU courts to apply Regulation 1/2003. However, as regards merger control, the power to investigate mergers is divided between the Commission and the national competition authorities. The allocation of cases is based on the turnover of the undertakings concerned.

[21] For the concept of legal transplant, see e.g. Watson (2000) and Spamann (2009).

The assessment criteria are examined by studying the Finnish merger control provisions[22], the EU Merger Regulation[23] and the guidance provided by the Finnish Competition Authority (FCA) Guidelines on Merger Control, Guidelines on the Application of the Competition Act, 1/2011 (hereinafter the Finnish Merger Guidelines) and the Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings (hereinafter the EU Horizontal Merger Guidelines). The criteria are also examined by studying the decision practices of the FCCA and the Commission, as well as the case law of the Market Court, previously the Competition Council[24], and the Court of Justice of the European Union, i.e. the Court of Justice and the General Court, previously the Court of Justice of the European Communities and the Court of First Instance (hereinafter jointly the Union Courts).[25]

Typically, merger assessment in oligopolistic markets requires an analysis of both the market structure and behaviour of firms. Market structure refers to factors such as the number of suppliers and buyers in the market, barriers to entry, cost structures and transparency, whereas behaviour refers to factors such as pricing, research and development (hereinafter R&D), entry and deterrence. As regards the merger assessment in oligopolistic markets, the following three questions can be posed: What type of criteria are decisive in analysing whether a merger results in a situation where firms have the ability and incentive to coordinate their behavior? What is the required level of likelihood to conclude that competition concerns exist? Will some of the criteria form a core for the assessment and prevail throughout the different phases of development in the merger control?

The assessment criteria have moved from a structure-based approach to a more behavioural, game-theoretic approach.[26] The more behavioural approach was confirmed by the Court of First Instance in the *Airtours v Commission* case[27], in

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[22] The study examines the merger control provisions provided in the Competition Act (948/2011) and in the Act on Competitive Restrictions (480/1992), amended by Act 318/2004.

[23] The study examines both the EU Merger Regulation of 2004 and the old Merger Regulation of 1989.

[24] The Market Court started as a special court on 1 March 2002. The Court hears market law, competition law, public procurement and civil IPR cases in Finland.

[25] Under the Treaty of Lisbon, the Union has a new institutional framework. As a result, institutions have been renamed. The Court of Justice of the European Union consists of three courts: the Court of Justice, the General Court (created in 1988) and the Civil Service Tribunal (created in 2004). For more information, see http://curia.europa.eu/jcms/jcms/Jo2_6999/.

[26] Petit and Neyrinck (2011), p. 1.

[27] Case T-342/99 *Airtours v Commission*.

which the Court established the three necessary conditions for the finding of collective dominance, also termed the *Airtours* criteria. The Court's judgment has been interpreted so that the conditions are not sufficient. The Court did not provide any additional conditions that must be fulfilled in order to conclude that the merger would result in competition concerns. Therefore, it could be asked what other conditions must be fulfilled to find coordinated effects. What is the level of likelihood that triggers an intervention by the competition authority? What is the standard of proof to be established? Is intervention possible at the incipiency of the anti-competitive effects? What types of evidence can be used in the appraisal process? It is also important to understand the reason for certain conditions to be considered necessary. For this purpose, the study also discusses the assumptions that derive from economic theory.

The theory of harm regarding coordinated effects is less certain compared to non-coordinated effects, also termed unilateral effects. In view of the variety of outcomes resulting in oligopolistic markets and the weak guidance provided by economic theory, the focus has been on the assessment criteria. The assessment criteria have been subject to discussions and analyses. Also, different approaches have been applied to the criteria as merger control provisions and case practice have developed in the EU and in the member states. The study identifies three different phases of the development of the assessment criteria based on the findings of the selected merger cases: i) the diversity of the assessment criteria, ii) the formalization of the assessment criteria and iii) the stabilisation of the assessment criteria. This division provides an opportunity to examine the assessment criteria in a systemised way.

The study concentrates exclusively on merger control and, in particular, on the merger assessment in oligopolistic markets. Cases of abuse of a collective dominant position are discussed only briefly. As regards the effects of merger on competition, the focus is on *coordinated effects* or *collective dominance*.[28] The concept of *coordinated effects* is mainly used under the SIEC test, whereas the concept of *collective dominance* was used under the dominance test. However, as the SIEC test states that effective competition can be significantly impeded in particular as a result of the creation or strengthening of a dominant position, the concept of collective dominance is therefore of importance also under the SIEC

[28] A collective dominant position is created or reinforced between the merged entity and one or several competitors that remained on the market after the merger. However, e.g. in Case IV/M. 1393 - *Exxon/Mobil* the combination of number two and three of the market led to the creation or strengthening of a dominant position of the third party in the market.

test.[29] Both concepts refer to the actions of firms that would be profitable only if they are accompanied by the actions of other firms, i.e. accommodating reactions.[30] The concepts of coordinated effects and collective dominance are also often equated with the concepts of *a collective dominant position* and *a joint dominant position*, as well as *joint dominance* and *oligopolistic dominance*. Also concepts of *parallel anti-competitive behaviour* and *coordinated interaction* are applied.[31] The above-mentioned concepts can be equated with the concept of *collusion*, and, in particular, with the concepts of *tacit collusion* or *implicit coordination*[32]. Tacit collusion is an economic concept and refers to oligopolistic behaviour which enables prices to be raised above the competitive level.[33] For the purpose of this study, the concepts are applied synonymously. For example, the FCCA has not made a difference between the concepts of *collective dominance* and *coordinated effects* in its decision practice. The FCCA has also explicitly stated that coordinated interaction can consist of tacit collusion.[34] Economic and legal definitions of collusion are further discussed in section 3.4.1.

In addition to coordinated effects, mergers in oligopolistic markets may also result in *non-coordinated effects*, i.e. *unilateral effects*. In contrast to coordinated effects, unilateral effects refer to the ability of a single firm to unilaterally increase prices without coordinating with its competitors.[35] Basically,

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[29] Finnish Merger Guidelines, p. 76. See also the EU Horizontal Merger Guidelines, para. 4. For other types of guidelines in which similar types of criteria are discussed, see e.g. the Guidelines for Electric Communications, para. 94.

[30] Willig (1991), pp. 292-293; OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 22. The concept of coordinated effects refers to a coordinated outcome the firm reaches even though they may be acting independently from each other, as in tacit collusion. Europe Economics (2001), p. 49.

[31] It has been argued that the concept of coordinated interaction also includes tacit collusion and therefore extends beyond the concept of explicit collusion or concerted practice. See, e.g. OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 22; Leddy (1993), p. 18. See also FTC, Promoting Competition, Protecting Competition: A Plain English Guide to Antitrust Laws (hereinafter FTC Guide to Antitrust Laws).

[32] For the concepts of explicit and tacit collusion, see OECD Roundtable on Unilateral Disclosure of Information with Anticompetitive Effects, DAF/COMP(2012)17, pp. 28-30. See also Lexecon Competition Memo, The Airtours Case, 12 November 1999. See also Lexecon Competition Memo, Joint Dominance. The CFI Judgement on Gencor/Lonrho, 9 June 1999, which discusses the judgment of the CFI and the concept of tacit collusion.

[33] It has been also argued that tacit collusion refers to conscious parallel behaviour without communication between the companies involved. In contrast to tacit collusion, expressed collusion is caused by explicit agreements or concerted practices. Faull and Nikpay (1999), pp. 25-26.

[34] See, e.g. *Fritidsresor/Finnmatkat*, Case No. 1976/81/99.

[35] See, e.g. FTC Guide to Antitrust Laws.

unilateral effects include all anti-competitive effects which are not characterized as coordinated effects.[36] As the focus of the study is on coordinated effects, unilateral effects are discussed only briefly in the context of the scope of the substantive test.

1.3 Method and Sources of the Study

The study examines the integration of the EU Merger Regulation and EU case practice into Finnish merger control regarding oligopolistic markets. The study applies the method of legal dogmatics which interprets and systemizes legal rules. Here, the interpretation is directed to the rules of the substantive tests in merger control, i.e. the SIEC test and dominance test. The tests are provided in the Finnish Competition Act and the preceding Act on Competition Restrictions as well as in the EU Merger Regulation. These set a benchmark for an anti-competitive merger. The focus of the systematization is on the assessment criteria. The assessment criteria are provided in the EU Merger Regulation and also in the guidance provided by the Commission and the FCCA, also referred to as soft law. The assessment criteria are examined by analysing the EU Merger Regulation, the guidance and decision practices of the FCCA and the Commission as well as the case law of the Market Court and the Union Courts, including the predecessors of these institutes.

Legal dogmatics interprets and systemizes legal rules with the objective of producing reasoned interpretation and systematization statements of the law,[37] and the weighing and balancing of legal principles and other legal standards which enjoy adequate institutional support and societal approval.[38] The methodology adopted in legal dogmatics is legal argumentation, in the sense of the above-mentioned interpretation and systematization of legal rules.[39] Legal dogmatics is based on the institutional sources of law such as legislation, preparatory legislative works, and precedents.[40] Non-institutional sources of law

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[36] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 23.

[37] Siltala (2004), p. 959; Siltala (2001), pp. 17-18; Hirvonen (2011), pp. 21-22, 25. Research results or outcomes of legal dogmatics comprise a set of legal statements concerning the interpretation and systematization of legal rules with reference to the prevalent normative ideology that is collectively internalized by the judiciary and other law-applying officials. Siltala (2004), pp. 936-937.

[38] Siltala (2004), p. 936.

[39] Siltala (2004), pp. 945-947.

[40] Siltala (2004), p. 946. For the sources of law, see e.g. Tolonen (2003). Institutional sources of law consist of legislation, preparatory works, and precedents, which are then rephrased by legal dogmatics in favour of a certain legal outcome. By

refer to arguments presented in legal dogmatics. Other arguments that may have legal significance consist, for example, of legal comparative arguments outside the context of a constant and uniform practice of interpreting EU law and arguments derived from the economic analysis of law.[41]

In this study, legal dogmatics is manifested in that the legal rules are interpreted and the assessment criteria systematized by examining the merger control provisions, including the preparatory legislative works, the guidance provided by the competition authorities in the form of guidelines, as well as case practice, including the decision practice of the competition authorities and case law.[42] In line with legal dogmatics, the study is based on the prevalent legal source doctrine in Finland. As regards institutional sources of law, the EU law is prioritized. The substantive provisions of the Finnish Competition Act and the EU Merger Regulation, as well as the guidance provided in the Finnish Merger Guidelines and the EU Horizontal Merger Guidelines for the interpretation of these provisions are very similar. The preparatory legislative works regarding Finnish merger control also explicitly requests the FCCA to seek guidance from EU competition law. This provides a basis for examining the legal rules and assessment criteria through a general objective of interregulation. The Government Bill of 1997 for the Act on Competition Restrictions requested the FCA to seek guidance from the old Merger Regulation, which was in force at that time, and therewith from the EU case law for the interpretation of the dominance test pursuant to Article 11d of the Act on Competition Restrictions. However, the Government Bill of 2010 for the Competition Act did not explicitly request the FCCA to seek guidance from the EU competition law but referred to the convergence of the Finnish provisions with the EU provisions.

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institutional sources of law are meant, for example, EU legislation, EU regulations, directives, and decisions given by EU organs the material ratio of which may also be extended to apply to other cases of a similar kind; national legislation; travaux préparatoires; precedents and other court decisions, the material ratio of which can be generalized to apply to other cases of a similar kind; legal standards that can be inferred from the decisions given by the European Court of Justice; decisions given other by law-applying officials, the material ratio of which can be generalized to apply to other cases of a similar kind and constant and uniform practice in interpreting EU law; and other law-applying officials in the countries which belong to the European Union. See Siltala (2004), pp. 942-943.

[41] Siltala (2004), pp. 942-943.

[42] Competition law research can arguably be restricted to legal dogmatics with the purpose of defining current legal state with the assistance of legal rules, legislative history and case law. Kuoppamäki (2003), p. 10.

The FCA, and later the FCCA, has constantly referred to the decision practice of the Commission and the case law of the Union Courts in its own decision practice. The Market Court, for its part, has referred to the convergence between the national competition law and EU competition law. For example, in the *NCC/Destia* case[43] the Market Court firstly stated that the antitrust provisions – even if the case concerned merger control - provided in the Treaty Establishing the European Community (hereinafter the EC Treaty), currently in the Treaty on the Functioning of the European Commission (hereinafter the TFEU), are directly applicable in national law. This statement is in line with the Treaty on European Union (hereinafter the TEU), which states that the case law of the Union Court is directly applicable and should be taken into account in the national authorities' decision practice. Secondly, the Market Court stated that even if the antitrust provisions are not applicable to merger control, the Court considers that the purpose of the TEU is the convergence between the national competition law and EU competition law, and that guidance should be sought from the EU provisions and case law and decision practice.[44] Hence, EU competition law is a major source of law in this study.

The interpretation and systematization of legal rules needs to be tailored for the legislative context and for the environment of the phenomenon. For the purposes of this study, tailoring requests that the interdependence of legal rules and the role of economics in merger control are taken into account. A common basis for merger control both in Finland and in the EU is provided by economic theories. Competition law, including merger control provisions, applies the tools and research outcomes of industrial economics which form a common basis for the enforcement of legal rules.[45]

In legal argumentation, the methodology needs to be adjusted for the type of legal source in question. Legal rules are usually wide and general in scope, and the legislator has given them an express norm-formulation.[46] The wording of the SIEC test, for example, only states that the merger should not significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position. Therefore, other sources of law become important for the interpretation and systematization of legal rules. In addition to

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[43] NCC Roads Oy, Destia Oy and Destia Kalusto Oy, Case No. 499/11/KR (hereinafter NCC/Destia).

[44] *NCC/Destia*, Case No. 499/11/KR, paras 191-193.

[45] In competition law enforcement, legal and economic arguments overlap. Hence, enforcement renders it possible to combine theory and case practice. Kuoppamäki (2003), p. 12.

[46] Siltala (2004), p. 946.

the guidelines provided by the competition authorities, an important source for the examination of the assessment criteria and the arguments concerning the interpretation and systematization of legal rules is provided in case practice.[47]

As regards Finnish merger control, the following cases are discussed in detail: *Fritidsresor/Finnmatkat*[48], *Carlsberg/Orkla*[49], *Lännen Tehtaat/Avena*[50] and *NCC/Destia*[51]. These cases are selected due to their ability to demonstrate the development of the assessment criteria in Finnish merger control as well as to show the influence that derives from the EU Merger Regulation and EU case practice. These cases are all assessed under the Act of Competition Restrictions and, therewith, under the dominance test. Other decisions in which oligopolistic markets are also discussed are referred to only briefly.

As regards EU case practice, the following cases and the guidance they provide are discussed in detail: *Nestlé/Perrier*[52], *Mannesmann/Vallourrec/Ilva*[53], *France and Others v Comission*[54], *Gencor v Commission*[55], *Airtours/First Choice*[56], *Airtours v Commission*[57], *Impala v Commission*[58], *Sony/BMG v Impala*[59] and *ABF/GBI Business*[60]. With the exception of the ABF/GBI Business case, all cases are assessed under the old Merger Regulation and, therewith, under the dominance test. However, the guidance provided under the dominance test is also relevant as the Commission explicitly stated that the precedence under the dominance test is still relevant according to the SIEC test. The SIEC

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[47] Competition law is typically characterized by a rough framework for the provision provided by the law and the legislative history and the case law and the decision practice is required to fulfill this gap. Kuoppamäki (2003), p. 10; Dethmers (2005), p. 640.

[48] Fritidsresor Holding AB/Oy Finnmatkat-Finntours Ab, Case No. 1976/81/99 (hereinafter Fridtidsresor/Finnmatkat).

[49] *Carlsberg AS/Orkla ASA:n panimoliiketoiminnat* Case No. 573/81/00 (hereinafter *Carlsberg/Orkla*). The target consisted of ASA's brewery businesses.

[50] Lännen Tehtaat Oyj/Avena Oy, Case No. 389/81/2002 (hereinafter Lännen Tehtaat/Avena).

[51] NCC Roads Oy/Destia Oy and Destia Kalusto Oy, Case No. 249/14.00.10/2011; NCC Roads Oy, Destia Oy and Destia Kalusto Oy, Case No. 499/11/KR (hereinafter NCC/Destia).

[52] Case No. IV/M.190 – *Nestlé/Perrier*.

[53] Case No. IV/M.315 – Mannesmann/Vallourec/Ilva.

[54] Joined Cases C-68/94 and C-30/95 *France and Others v Commission*.

[55] Case T-102/96 Gencor v Commission.

[56] Case IV/M1524 – Airtours/First Choice,

[57] Case T-342/99 Airtours v Commission.

[58] Case T-464/04 Impala v Commission.

[59] Case C-413/06 Bertelsmann and Sony Corporation of America v Impala.

[60] Case COMP/M.4980 - *ABF/GBI Business*.

test also provides the creation or strengthening of a dominant position as a particular example of the significant impediment to effective competition. The EU cases are selected due to their ability to illustrate the development in EU merger control which, in turn, has affected the development of Finnish merger control. These cases are also referred to in Finnish case practice. The analysis of the EU cases will also provide information about whether the decision practice and case law have complemented, changed or confirmed the approach adopted in previous case practice.

1.4 Structure of the Study

The study consists of six chapters. Chapter 1 provides an introduction to the subject and formulates the objective of the study as well as describes the method applied. The study aims to examine the integration of the EU Merger Regulation and EU case practice into Finnish merger control regarding oligopolistic markets. The focus is on the assessment criteria and the development of the criteria from a structure-based approach to a more behavioral approach. Chapter 2 discusses the regulatory framework and the extent to which the Finnish merger control provisions are applicable to competition concerns identified in oligopolistic markets and, therewith, discusses the scope for intervention.

Chapter 3 discusses the assumptions on which both Finnish and EU merger controls are based. These presumptions derive from economic theory on market structure and market behaviour. The chapter also discusses the indicators regarding these assumptions. In addition, the chapter discusses the characteristics of oligopolistic markets and provides underlying theories of competitive harm: coordinated effects and non-coordinated effects. The chapter briefly discusses the role of economic evidence.

Chapter 4 discusses the scope of the EU merger control provisions and the assessment criteria for mergers in oligopolistic markets as well as the development of these criteria in the light of the selected merger cases. The study identifies three different phases of the development of the assessment criteria based on the findings of the selected merger cases: i) the diversity of the assessment criteria, ii) the formalization of the assessment criteria and iii) the stabilisation of the assessment criteria. This division provides an opportunity to examine the assessment criteria in a systemised way. The cases are grouped according to this division. The emphasis is on the tools the assessment criteria provide for merger assessment in different phases of the development. The chapter also discusses the specific characteristics of mergers in oligopolistic

markets and how the characteristics affect the design of remedies. Of particular interest is whether remedies are targeted on structural features of the market or market conduct, or both simultaneously.

Chapter 5 discusses the criteria that have been applied to merger assessment in oligopolistic markets in Finland and the development of these criteria in the light of the development in EU merger control. In chapter 4, the assessment criteria are grouped into different phases of the development and the emphasis is on the tools they provide for merger assessment. In this chapter, the emphasis is on the actual application of these criteria in merger cases in Finland. The chapter also discusses the types of remedies that have been applied in order to eliminate anti-competitive effects on mergers.

Chapter 6 provides concluding remarks and discusses the tentative development of the assessment criteria for mergers in oligopolistic markets.

2 REGULATORY FRAMEWORK FOR THE CONTROL OF OLIGOPOLIES IN FINLAND

2.1 Merger Control in Finnish Competition Policy

This chapter describes the development of the Finnish merger control provisions. The chapter focuses on the control of mergers in oligopolistic markets but also provides general information about merger provisions such as the substantive test, the role of market definition in merger control and the anti-competitive effects which may arise in oligopolistic markets. The chapter also discusses particular aspects of oligopoly control within the regulatory framework.

The first Finnish merger control provisions entered into force on 1 October 1998 with the effect that there could be intervention with concentrations [61] with adverse effects on competition in Finland or in a substantial part thereof. The provisions were adopted as an amendment to the Act on Competition Restrictions (480/1992).[62] The Act itself entered into force on 1 September 1992, but the amendments with merger control provisions were passed by the Finnish Parliament on 24 March 1998. Simultaneously with the entry of merger control provisions in 1998, the FCA issued the Guidelines on the Control of Concentrations (hereinafter the first Finnish Merger Guidelines). These guidelines provided detailed information, *inter alia*, on the concept of concentration, the calculation of turnover, joint ventures, and the assessment of the effects of a merger on competition.

When merger control provisions were adopted in Finland in 1998, an established approach was that the provisions also covered collective dominance. This approach was provided, *inter alia*, in the Government Bill 243/1997 for the Act on Competition Restrictions of 30 December 1997, in the Report of the Ministry of Trade and Industry[63], in Article 3(2) of the Act on Competition Restrictions, and in the first Finnish Merger Guidelines, and most importantly, in an

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[61] Similar to EU merger control the concept of concentration covers various types of transactions such as mergers, acquisitions and certain joint ventures. For the purpose of this study the concept of merger is applied in order to describe a transaction where control is changed either through a merger or an acquisition or through establishing a so-called full-function joint venture.

[62] Act on Competition Restrictions (480/1992), amended on 1 May 2004 (318/2004).

[63] Reforming the Finnish Competition Law – Merger Control and Competence Issues. Committee Report by the Ministry of Trade and Industry, 3/1993.

established approach with regard to the scope of the old Merger Regulation. Also the fact that the merger control provisions did not exclude collective dominance formed a basis for the assumption that they could be applied to collective dominance. The preparatory legislative works confirms this interpretation.

The first merger control provisions of 1998 were based on the dominance test. The test was provided in Article 11d of the Act on Competition Restrictions where it is stated that a merger may be prohibited[64] if as a result of it, "*a dominant position shall arise or be strengthened which significantly impedes competition in the Finnish market or in a substantial part thereof*". The wording was identical to the dominance test provided in the old Merger Regulation.

The Act on Competition Restrictions was amended several times, notably on 1 May 2004 (318/2004). [65] The amendments resulted mainly from the modernization of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (hereinafter Regulation 1/2003). The amendments to the Act on Competition Restrictions entered into force on 1 May 2004, i.e. at the same time as the adoption of Regulation 1/2003.

In the course of the review in 2004, the dominance test prevailed as a substantive test for merger control in Finland. This was despite the fact that the substantive test was changed in the EU and that the scope of the dominance test was questioned. The reason that the substantive test was not changed in Finland was mainly due to the fact that the recast Merger Regulation[66] - with the effect that the substantive test was changed in the EU - was adopted after the national preparatory legislative works amending the Act on Competition Restrictions was concluded.[67] Presumably, the change of the substantive test was on the agenda when the Act would be amended next time.

The preparatory legislative works with the aim of amending the Act on Competition Restrictions was initiated on 13 June 2007 when the Ministry of

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[64] In Finnish merger control the prohibition decision is given by the Market Court on the proposal of the FCCA.

[65] The Ministry of Trade and Industry provided a proposal for the amendments on 20 February 2004.

[66] Proposal for review of the Merger Regulation was adopted by the Council on 27 November 2003. See European Council, 2547th Council Meeting – Competitiveness – (Internal market, Industry and Research). 15141/03 (Presse 337). Brussels, 26-27 November 2003. See also the European Commission Press Release, "Commission welcomes agreement on new Merger Regulation." IP/03/1621, 27 November 2003.

[67] FCA Yearbook 2004, p. 3.

Trade and Industry (currently the Ministry of Employment and the Economy, MEE) appointed a working group, i.e. the Competition Act 2010 Working Group. The working group was assigned the task of identifying the need for reform of the Act and to prepare proposals for the required amendments.[68] A majority of the working group's proposals aimed to clarify and update the current provisions of the Act. The proposals also contained reforms for merger control provisions such as changing the substantive test, elimination of the deadline set for compulsory notification for mergers and the possibility to extend processing time limits. The working group published a report stating, *inter alia*, that a merger which leads to the creation or strengthening of a dominant position with potential negative phenomena makes the market structure more rigid for a longer time and assists collusive behaviour.[69] The report also stated that in duopolistic or oligopolistic markets further concentration would increase the risk of cartelisation and that the elimination of a competitor would promote the sustainability of a cartel.[70]

The report recognised that in certain situations firms may coordinate without a concerted action, i.e. an action subject to a prohibition decision under the antitrust rules. This type of behaviour is often based on the signals that firms send to the market independently of each other. In particular, in the presence of a homogeneous product and high barriers to entry, a situation may occur where the members of an oligopoly may through a coordinated pricing policy increase the price above the competitive level. The report further states that this situation should be taken into account in merger assessment in a concentrated market and that the potential for collective dominance must be assessed.[71]

The new Competition Act (948/2011) entered into force on 1 November 2011[72], thus replacing the Act on Competition Restrictions. The purpose of the Competition Act is to protect sound and effective economic competition from harmful restrictive practices. Special attention is paid to the protection of the operating conditions of the markets and the freedom of undertakings to operate

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[68] Competition Act 2010 Working Group, MEE Publications, Competitiveness 4/2009, available at http://www.tem.fi/files/21617/TEM4.pdf.

[69] Competition Act 2010 Working Group (2009), p. 88.

[70] Competition Act 2010 Working Group (2009), p. 159.

[71] Competition Act 2010 Working Group (2009), p. 159.

[72] FCA Press Release, “New Competition Act effective from 1 November”, 12 August 2011. For information about the new Competition Act, see e.g. Lindberg (2011a), pp. 249-261; ECN Brief, 02/2011, "Finland: New Competition Act approved by the Parliament", p. 33; ECN Brief 03/2011,"Finland: Public Consultation on Guidelines complementing the new Competition Act", p. 32.

so as to allow customers and consumers to benefit from competition.[73] In the new Act, merger control provisions are provided in Chapter 4. The chapter describes, among other things, the concept of concentration, the scope of the application of the merger control provisions, the notification criteria, calculation of turnover, prohibition criteria, time limits and implementation rules.

One of the major changes brought about by the Competition Act was the change of the dominance test into the SIEC test. By the time the Act was amended, Finland could benefit from the experience the Commission already had in applying the SIEC test. In addition to changing the test, the Competition Act also clarified certain procedural rules for merger enforcement regarding the right of appeal and implementation of the notified merger. Alongside the Competition Act, the new Finnish Competition Authority (FCA) Guidelines on Merger Control (hereinafter the Finnish Merger Guidelines) were adopted[74]. The new guidelines replaced the first Finnish Merger Guidelines of 1998 and were aligned with the EU Horizontal Merger Guidelines published in 2004. The Finnish Merger Guidelines provide guidance, among other things, on the notification criteria, calculation of turnover, appraisal process, assessment of competitive effects, and remedies.

The Competition Act also brought other amendments. The antitrust provisions were already harmonized with Articles 101 and 102 TFEU in 2004 and thus remained unchanged.[75] However, the definition of the concept of undertaking was now harmonized to that applied in the EU. Other changes were mostly procedural. The Competition Act, for example, clarified the rights to defense in competition enforcement proceedings, for example, in terms of self-incrimination and legal professional privilege. The Competition Act also provided explicit prioritisation rules by stating that the FCCA shall prioritise its tasks and that it shall not investigate a case if certain criteria are met.[76] In addition, the Competition Act introduced a new provision, according to which a firm which coerced other firms to participate in the cartel would not be eligible for immunity from fines. Although the leniency provisions in Finland have been aligned with the European Competition Network's Model Leniency Programme, the

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[73] The content of the new Act is discussed in detail by Lindberg (2011b) and Kuoppamäki (2012).

[74] Finnish Competition Authority (FCA) Guidelines on Merger Control, Guidelines on the Application of the Competition Act, 1/2011, available at http://www.kilpailuvirasto.fi/tiedostot/Suuntaviivat-1-2011-Yrityskauppavalvonta-EN.pdf.

[75] Kilpailunrajoituslain uudistus 2004, available at http://www.kilpailuvirasto.fi/tiedostot/krl-esite.pdf.

[76] The FCCA is entitled to prioritise, for example, if a complaint is 'manifestly groundless'.

Competition Act introduced concrete provisions concerning the amount of fines to be reduced, as well as further requirements to qualify for immunity or for the reduction of fines.[77] The Competition Act did not bring any changes to a penalty system which remained based on administrative fines.[78] The Competition Act also strengthened the FCCA's investigative powers. [79] In addition, the Competition Act modified provisions regarding damage compensation.[80]

Alongside the adoption of the Competition Act, the Government published a decree on the calculation of turnover of a party to a concentration (1011/2011)[81] and a decree on the obligation to notify a concentration (1012/2011) [82]. In addition to the Finnish Merger Guidelines, guidelines on the assessment of the amount of the fines and on prioritisation rules, as well as revised guidelines on leniency were published.[83]

As regards the notification criteria, the transaction must form a concentration within the meaning of Section 21 of the Competition Act[84] and meet the turnover thresholds pursuant to Section 22 of the Competition Act. Currently, a merger must be notified to the FCCA if the combined aggregate worldwide turnover of

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[77] According to the Competition Act, immunity may also be granted after the FCCA has carried out an inspection.

[78] The provisions for calculating the limitation period are now similar to those provided by Regulation 1/2003.

[79] The Competition Act also provided the FCCA with power to inspect non-business premises. Previously, the FCCA had only the power to inspect business premises. Inspection of non-business premises is, however, subject to an authorization by the Market Court.

[80] According to the Competition Act any individual, not only business undertakings as previously stated, is able to seek compensation.

[81] Government Decree on the Calculation of Turnover of a Party to a Concentration (1011/2011), available at http://www.kilpailuvirasto.fi/cgi-bin/english.cgi?luku=legislation&sivu=decree-on-calculation-of-turnover.

[82] Government Decree on the obligation to notify a concentration (1012/2011), available at http://www.kilpailuvirasto.fi/cgi-bin/english.cgi?luku=legislation&sivu=decree-obligation-to-notify.

[83] Finnish Competition Authority (FCA) Guidelines, Immunity from and Reduction of Fines in Cartels Cases, Guidelines on the Application of the Competition Act, 2/2011, available at http://www.kilpailuvirasto.fi/tiedostot/Suuntaviivat-2-2011-Leniency-EN.pdf.

[84] Merger control provisions cover the following transactions: i) the acquisition of control referred to in Chapter 1, Article 3, of the Companies Act (734/1978) or an acquisition of a corresponding actual control; ii) the acquisition of the entire business operations or a part thereof; iii) a merger and iv) setting up of a joint venture which shall perform on a lasting basis all the functions of an autonomous economic unit, i.e. a so-called full-function joint venture.

the parties exceeds EUR 350 million and the turnover of a minimum of two parties derived from Finland exceeds EUR 20 million.[85]

Mergers are notified by submitting a notification form.[86] The notifying party or parties must provide information about, among other things, the type of transaction, company structure, affected markets and the position of the merging parties in the affected markets, as well as information about competitors, customers and suppliers. A simplified notification procedure can be applied if the effects of a merger on competition are likely to be minor or if all information that is requested in the standard notification form is not relevant for the merger assessment in this particular case.[87]

A merger that fulfils the national notification criteria under the Competition Act will be assessed by the FCCA. If the notification criteria provided in the Merger Regulation are fulfilled the merger will be exclusively investigated by the Commission. The case allocation between the Commission and the national competition authorities is based on turnover criteria. Under certain circumstances mergers can also be referred from a national competition authority to the Commission, and *vice versa*. This type of case referral system is provided in the Merger Regulation. In the pre-notification phase, cases can be referred by the Commission to the member states pursuant to Article 4(4) of the Merger Regulation and from the member states to the Commission pursuant to Article 4(5).[88] In the post-notification phase, cases can be referred from the Commission to the member states pursuant to Article 9, and from the member states to the Commission pursuant to Article 22.[89] Due to the case allocation and referral systems, national merger control cannot differ too much from that of the EU.

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[85] Detailed information about the turnover criteria are published in the Decree by the Ministry of Trade and Industry on the Calculation of Turnover of a Party to a Concentration (377/2004).

[86] The notification form is provided in the Decree by the State Council on the obligation to notify a concentration (1012/2011). See also the FCA's Guidelines on the Control of Concentrations (hereinafter the Finnish Merger Guidelines) and the FCA's Guidelines on the Revised Provisions on the Control of Concentrations.

[87] These consist of arrangements "where companies to which turnover derives from Finland, set up a joint venture or obtain joint control in a company which has no connection to the Finnish markets. There is no connection to the Finnish markets if the joint venture does not engage business in Finland and no turnover derives to it from Finland." See, e.g. ICN Merger Notification and Procedures Template, Finland, available at http//www.internationalcompetitionnetwork.org.

[88] Commission Notice on Case Referral, paras 16-32, OJ 2005 C 56/5-9.

[89] Commission Notice on Case Referral, paras 33-45, OJ 2005 C 56/9-11.

The merger assessment consists of two phases. In the first phase, the FCCA must decide whether the transaction will be investigated under the Competition Act, and in the affirmative, either to clear the transaction as such or under certain conditions, or initiate an in-depth investigation, also termed a second-phase investigation, pursuant to Section 26 of the Competition Act. The first phase lasts one month and the time limit is calculated from the date the FCCA receives a notification form. In case the notification is significantly incomplete, a one-month time limit does not begin. The time limits can be extended if the information which may be requested by the FCCA under Section 33 of the Competition Act and which the firms are obligated to submit is not provided on time. The time limits are extended by the same number of days that the submission of information is delayed (a so-called stop-the-clock provision). This extension applies both in the first phase and in in-depth investigations.

If the FCCA initiates an in-depth investigation, it must, within three months from that decision either clear the transaction as such or under certain conditions or make a proposal to the Market Court to prohibit the merger. The FCCA itself cannot prohibit a merger. A merger can only be prohibited by the Market Court upon proposal by the FCCA. The Market Court must provide a decision within three months starting from the date the FCCA proposal is received. The Market Court can prohibit the merger as proposed by the FCCA or attach conditions on the implementation of a merger. So far, the FCCA has proposed a merger to be prohibited by the Market Court only in two cases.[90] The table below provides statistics on the FCCA's merger decisions.

[90] The first prohibition proposal concerned the acquisition of joint control by Sonera Oyj in Digita Oy, a subsidiary of the Finnish Broadcasting Corporation Yleisradio Oy in 2000. The second prohibition proposal concerned the merger between NCC Roads and Destia Oy in 2011. The latter case is discussed later in this study. See the FCA Press Release, "FCA Proposes Prohibition of Merger between NCC and Destia", 5 August 2011.

Table1. Merger Decisions in Finland 2007-2013

	2007	2008	2009	2010	2011	2012	2013
Decisions	35	24	14	23	28	24	23
Clearance without conditions							
- Phase I	34	23	14	23	26	19	18
- Phase II	1	-	-	-	-	2	
Clearance with conditions	-	-	-	-	1	-	-
- Phase I	-	-	-	-	-	-	-
- Phase II	-	1	-	-	1	-	1
Proposal to prohibit a merger	-	-	-	-	1	-	-
Other decisions	-	-	-	-	-	3[91]	4

The first merger provisions in Finland came into effect on 1 October 1998. During the early years of merger control there was a strong growth in cases that fulfilled the notification criteria under the Act on Competition Restrictions. For example, during 2000-2002 the FCA made over 100 decisions per year. In 2004, the notification criteria were changed as the Act on Competition Restrictions was amended. As a result of the amendment the number of notifications decreased. Currently, the FCCA receives approximately 20 notifications per year.

The table above also illustrates three general outcomes of the merger assessment: a clearance as such, a clearance under certain conditions or a decision to propose

[91] These decisions are decisions to initiate second phase proceedings. With regard to the year 2009, in those cases where second phase proceedings were initiated the FCA also made a final decision in the same year.

a prohibition.[92] If the merger does not result in competition concerns, it will be cleared as such. If competition concerns are identified, a merger can be cleared subject to remedies proposed by the merging parties provided that remedies adequately address the competition concerns identified. If adequate remedies are not available, either due to the nature of the transaction or the lack of the merging parties' willingness to provide them, the FCCA will propose the Market Court to prohibit a merger. As illustrated in the table, the vast majority of mergers are cleared in the first phase without any conditions set for the approval.

2.2 Substantive Test for Merger Assessment

2.2.1 Change of Substantive Test

The Competition Act in 2011 changed the dominance test into the SIEC test. The SIEC test is provided in Section 25 of the Competition Act and states that the Market Court may, upon the proposal of the FCCA, prohibit a merger, order a merger to be dissolved, or attach conditions on the implementation of a merger if the merger would "*significantly impede effective competition in the Finnish markets or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position*". The test is identical to the substantive test provided in Article 2(3) of the Merger Regulation.

By the time the SIEC test was adopted in 2011, Finland could already benefit from the discussion that was initiated by the Commission by publishing a Green Paper on the Review of Council Regulation (EEC) No. 4064/89 (hereinafter the Green Paper) in 2001.[93] As regards the merits of the competitive tests, one of the subjects discussed in the Green Paper was whether the dominance test covers non-coordinated effects, also termed unilateral effects, in the oligopolistic market structure. The Green Paper discussed differences between the dominance test and the SLC test. The new concept of the SIEC test was only introduced when the final version of the recast Merger Regulation was adopted in 2004.

One of the reasons for changing the substantive test was that the SIEC test would better - compared to the dominance test - cover all types of anti-competitive

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[92] The notifying parties, however, will always have the possibility of withdrawing in any phase of the appraisal process, for example, in order to avoid the prohibition decision taken by the competition authority.

[93] Commission, Green Paper on the Review of Council Regulation (EEC) No. 4064/89. COM (2001) 745 final (hereinafter Green Paper (2001)).

effects a merger may result in. An often-referred example of a situation that is not covered by the dominance test is a merger between the second- and third-largest firms in the market, where both firms have a product range that would pass as a close substitute for another's range. Another precondition for this situation is that the merged entity would not become a market leader with a dominant position. This type of situation is known as a gap case and it may result in significant impediment to effective competition. The situation is covered by the SIEC test, whereas the use of the dominance test would normally require that a collective dominant position is established between the merged entity and the market leader.[94] A single dominant position would be difficult to establish for the following reasons. Firstly, it would be difficult to argue that the merged entity that is not a market leader could act independently of its competitors, customers and consumers. Secondly, the market leader would allegedly enjoin market power and would potentially act as a competitive constraint against the merged entity.[95]

Another reason that would promote for the change of the test is that under the dominance test non-coordinated effects may be mis-characterized as coordinated effects.[96] The risk would arise for several reasons. Firstly, a number of unilateral effects cases cannot be captured under a dominant position standard and there is an alleged temptation to characterize them as coordinated effects. Secondly, a merger which combines two smaller firms to attain the size of competitors increases the symmetry in the market and on that ground presumably facilitates collusion. However, a relevant threat in this situation would more likely arise from unilateral effects.[97]

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[94] Green Paper (2001), p. 39. Some commentators for the Green Paper referred to the so-called *Beech Nut* case decided by the FTC in the US. In this case Heinz was to acquire Beech Nut to become number two after the market leader Gerber in the market for baby food. Commission, Green Paper on the Review of Council Regulation 4064/89, 2001 – Summary of the Replies Received, available at http://europa.eu.int/comm/competition/mergers/review/comments/summary_publication.pfd (hereinafter Comments on the Green Paper (2001)).

[95] In its report, the Competition Act 2010 Working Group stated that mergers in concentrated markets may also have positive effects. If a dominant firm already exists in the market, a merger between smaller competitors can lead to more competitive behaviour as the merged entity may force a dominant firm to compete. Competition Act 2010 Working Group (2009), p. 88. It could be asked whether the statement indicates that the merger between the second- and the third-largest company in the market, without the merged entity becoming a market leader, might not always result in competition concerns.

[96] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, pp. 8, 325.

[97] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 325.

A merger that would create or strengthen a single dominant position is expected to result in cuts in the output. By analogy, in the case of coordinated effects each of the coordinating firms is expected to cut output post-merger. There is no such analogy related to non-coordinated effects which result from a merger believed to create or strengthen a collective dominant position held by a set of non-structurally linked members of an oligopoly. In such a case only the merging parties would be expected to cut output. Competitors - unless they are not capacity constrained - would be expected to increase outputs. The concept of collective dominance would therefore be difficult to extend to cover unilateral effects arising post-merger among a group of non-structurally linked members of an oligopoly.[98]

The risk of mis-characterization of competitive effects could be avoided, for example, by lowering the threshold linked to dominance. This would, however, lead to markets where more than one firm could hold a single dominant position.[99]

There might also be a risk of mis-characterization of competitive effects if a merger results both in non-coordinated effects and coordinated effects. Due to the greater theoretical clarity of non-coordinated effects, it could be preferable to apply a theory of harm which relates to non-coordinated effects. The mis-characterization may also lead to the adoption of incorrect remedies and foster legal uncertainty. The dominance test has been argued to import mis-characterization risk and force unilateral effects into some kind of dominance story which ultimately involves pushing things into a "black box".[100]

2.2.2 Elements of SIEC Test

The wording of the SIEC test requires the FCCA to assess whether a merger would "significantly impede effective competition in the Finnish markets or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position". Hence, the SIEC test is based on significant impediment to effective competition. The creation or strengthening of a dominant position is only one example of this type of effect.

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[98] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 8.

[99] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 8.

[100] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 325.

The parts of the SIEC test are identical to those of the dominance test but are presented in reverse order. As regards the dominance test, the test consists of the creation or strengthening of a dominant position and the significant impediment to effective competition. At the time the dominance test was applied, a question was occasionally raised as to whether test was a single or a two-fold test and whether the emphasis of the different parts of the test differed. In Finland, the two parts were equally relevant in the merger assessment.[101] For example, the first Finnish Merger Guidelines stated that the effects of a merger on competition should be assessed as a whole by assessing the creation or strengthening of a dominant position and significant impediment to effective competition which results from the said position. It could be argued that the assessment of a dominant position refers to a so-called "qualified dominance". The Government Bill for the Competition Act in 2010 further stated that the first investigative step under the dominance test is whether a merger creates or strengthens a dominant position and, consequently, whether the said position leads to a significant impediment to effective competition.[102]

According to the Finnish Merger Guidelines competition will be significantly impeded if the anti-competitive effects of a merger are either long-lasting or strong. Competition is not significantly impeded if a dominant position is lost, for example, as a result of new entry into the market.[103] Mergers are inevitably assessed on a case-by-case basis and a variety of factors are taken into account, such as the market position of the merged entity, the buyer power of customers and the expected development of the market.

In its assessment the FCCA will also take into account countervailing factors such as potential competition and efficiencies. Competition may not be significantly impeded, for example, due to the resulting efficiencies. The Finnish Merger Guidelines explicitly state that efficiencies should also be taken into account in the merger assessment. Efficiencies may consist, for example, of productive efficiencies such as improvement in product quality, increase in efficiency in production and distribution, improvement in productivity, production of a larger product range with the same production contributions or an equivalent decrease in the production, supply or distribution costs. Efficiencies may also consist of dynamic efficiencies such as innovations in production or distribution in order to develop new or improved products.[104]

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[101] Lindberg (2011b), p. 759.
[102] Government Bill of 2010 for the Competition Act. HE 88/2010.
[103] Finnish Merger Guidelines, p. 62.
[104] Finnish Merger Guidelines, pp. 71, 93.

The significance and weight that is given to efficiency gains depend on how significant they are, how likely they are to be achieved and whether they increase competition for the benefit of customers and consumers. Also the time frame within which the efficiencies can be transferred to customers and consumers is taken into account.[105] Merging parties who refer to efficiencies must provide reliable evidence on expected efficiencies and that the merger is a necessary means for the achievement of these gains. Efficiencies must materialize in the Finnish markets and be passed on to consumers and customers located in Finland. If efficiencies can be achieved by less restrictive means, the proposed efficiencies are not accepted.[106]

Competition may not be significantly impeded, either, if the target company is a failing firm, i.e. a firm with major economic difficulties, and would exit the market despite the merger. In this situation, the market is expected to be concentrated despite whether or not a merger will be consummated. The merging parties have to provide evidence that the merger is the only rational way to prevent the assets from exiting the market and that there is no less restrictive means available.[107]

Under the SIEC test, the creation or strengthening of a dominant position is only one example of significant impediment to effective competition. However, according to the Finnish Merger Guidelines a dominant position is still assumed to remain as the most important indicator of a significant impediment to effective competition.[108] The same assumption is made in the EU Horizontal Merger Guidelines.[109] A dominant position indicates an actual potentiality of a firm to act independently of actual or potential competitors, customers and suppliers. In particular, a firm with a dominant position is able to significantly control the price level or the terms of delivery.[110] Competitors, customers and suppliers cannot carry out measures that could affect substantially or rapidly the exercise of market power by a dominant firm.[111] However, a strong market position is not synonymous with a dominant position. A dominant position results from a certain degree of market power.

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[105] Similarly, the EU Horizontal Merger Guidelines state that the potential efficiency gains must be passed on consumers.

[106] Finnish Merger Guidelines, p. 94. See also the First Finnish Merger Guidelines, pp. 39-40.

[107] Finnish Merger Guidelines, pp. 94-95.

[108] Finnish Merger Guidelines, p. 61.

[109] EU Horizontal Merger Guidelines, para 4.

[110] The ability to control the price level or terms of delivery is stated in Article 4 of the Competition Act.

[111] Finnish Merger Guidelines, p. 38.

A dominant position is typically based on technical, legal, strategic, economic or some other competitive advantage which cannot be imitated by competitors or substituted by competitors' own development of other competitive advantages. A dominant position is also targeted to a large number of customers. Customers, suppliers and competitors may be dependent on a dominant firm in several ways. Customers may have to supply the products from a dominant firm due to lack of substitutes available. A dominant firm may also control marketing and distribution, thus forcing competitors into business relationships with it. A dominant firm is able to response to any competitive action initiated by its competitors and is able to control the price level in the market.[112]

A merger may result in the creation of a dominant position if the merged entity is able to act independently of its competitors, customers and suppliers in some markets. A dominant position will be strengthened as a result of the merger if an already existing ability to act independently of competitors, customers and suppliers is expanded post-merger.[113]

According to the Finnish Merger Guidelines, a dominant position is typically achieved by one firm. However, in certain cases it may also be achieved jointly by several firms. The Competition Act does not distinguish between the two situations. Cross-ownerships and agreements that go beyond the ordinary can also be considered as strong indicators of collective dominance.[114]

2.2.3 Scope of SIEC Test

The adoption of the SIEC test ensured that the Finnish merger control provisions are applicable both to coordinated effects and non-coordinated effects in oligopolistic markets. The SIEC test thus closed the alleged gap which was found in the scope of the dominance test. However, in practice only a few cases were identified in which a different conclusion would have been reached if the SIEC test, instead of the dominance test, had been applied.[115]

The scope of the SIEC test is wider than that of the dominance test. The adoption of the SIEC test in the EU, and in Finland later on, aimed to cover all types of competitive concerns and was one of the reasons for the change of the test. The

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[112] First Finnish Merger Guidelines, pp. 38-39.
[113] First Finnish Merger Guidelines, p. 39.
[114] Finnish Merger Guidelines, p. 39.
[115] Lindberg (2011b), p. 767. The statement was expressed in an expert report by Professor Tomi Laamanen. The report was prepared by the request of the Competition Act 2010 Working Group.

Commission explicitly stated that "the principle issue motivating the change was non-coordinated effect**s** in oligopoly markets, where the merged entity might have market power without necessarily having an appreciably larger market share than the next competitor".[116]

The SIEC test focuses on the effects of a merger on competition in the market,[117] i.e. whether a merger significantly impedes effective competition. The effects of a merger on competition are usually divided into two main categories: non-coordinated effects – also termed unilateral effects - and coordinated effects. The concept of non-coordinated effects refers to a situation where a merger eliminates important competitive constraints on one or more firms, which consequently would have market power, without resorting to coordinated behavior. Coordinated effects refer to a situation where, as a result of the merger, firms that previously were not coordinating their behavior are now significantly more likely to coordinate. A merger may also make coordination easier, more stable or more effective for firms which were coordinating prior to the merger.[118] The SIEC test covers both sets of effects.

When examining the wording of the tests, the creation or strengthening of a dominant position can be considered as a sub-concept of significant impediment to effective competition: competition is reduced to such an extent that a dominant position is created. The SIEC test, similar to the SLC test, is also a flexible test for measuring the effects of a merger on competition. In addition to the lessening of price competition, the test also applies to the lessening of future competition or competition on innovation.[119] The SIEC test arguably emphasises the change brought about by a merger, i.e. how much competition is lost as a result of a merger, whereas the dominance test emphases the outcome, i.e. how much competition is left after the merger.[120] Consequently, a dominant position is a more structural concept.[121]

The most direct effect of a merger on competition is the loss of competition between the merging parties. A merger giving rise to non-coordinated effects

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[116] OECD Competition Law and Policy in the European Union – 2005, 30, available at www.oecd.org/dataoecd/7/41/35908641.pdf.

[117] Finnish Merger Guidelines, p. 60.

[118] EU Horizontal Merger Guidelines, para 22.

[119] Hautala (2002), p. 47.

[120] Finnish Merger Guidelines, p. 60; Vickers (2004), p. 460; OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, pp. 26, 325; Temple Lang (2000).

[121] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 325.

would significantly impede effective competition by the creation or strengthening of a dominant position of a single firm. Single dominance typically derives from large market-share. A significant impediment to effective competition may also result from a merger which eliminates the competitive constraint the merging parties previously exerted upon each other and simultaneously reduces the competitive pressure on the remaining competitors.[122]

The higher the degree of substitutability between the merging parties is, the more likely it is that the merged entity will raise prices significantly. The merged entity would generate a significant price increase in a differentiated product market if a substantial number of customers considers the products of the merging parties as their first and second choices. In the absence of a merger, if one of the merging parties had raised its price, it would have lost sales to the other party.[123] Due to the merger sales that would otherwise be lost are now captured within the merging parties.

2.2.4 Role of Dominance Test

Under the SIEC test, the creation or strengthening of a dominant position is an example of the significant impediment to competition. Hence, the concept of dominance and the guidance related to the dominance test is still important. In addition, the majority of cases examined in this study have been assessed under the dominance test.

The dominance test was provided in Article 11d of the Act on Competition Restrictions. The provision stated that a merger may be prohibited[124] if as a result of it, "*a dominant position shall arise or be strengthened which significantly impedes competition in the Finnish market or in a substantial part thereof*". A dominant position refers to a position which is not constrained by competitors, suppliers and customers, and therewith a position in which a firm can act independently. The concept of a dominant position and the criteria of the said position are also referred in cases regarding an abuse of a dominant position.

The "significant impediment to effective competition" proviso of the dominance test was intended to prevent severe adverse effects on competition resulting from the structural change brought about by the merger. The significant impediment

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[122] EU Horizontal Merger Guidelines, paras 24-25.

[123] EU Horizontal Merger Guidelines, paras 24, 28.

[124] In Finnish Merger Control, the prohibition decision is given by the Market Court on the proposal of the FCCA.

referred to a situation where adverse effects on competition were either substantial or of lasting duration.[125]

The explicit wording of the dominance test pursuant to Article 11d of the Act on Competition Restrictions did not state whether the test can be applied to a collective dominant position but did not exclude this interpretation, either. However, the ability to intervene on the basis of the creation or strengthening of a collective dominant position required that the merger control provisions would cover the said position in the first place.[126]

An established approach was that the dominance test could be applied both to a single and a collective dominant position. A collective dominant position was arguably covered by the dominance test despite the fact that the wording of the test does not explicitly refer to that. The dominance test, however, did not cover a situation where competition would be reduced in oligopolistic markets as a result of a merger between the second and third largest firms in the market without the merged entity becoming a market leader.

A dominant position was basically assessed in the same way, irrespective of whether it was held by a single firm or jointly by several firms. In the case of several firms, the market positions are affected by turnovers, competitive effects, economic resources and other factors of all the companies, which subsequently affect the creation of a dominant position.[127]

In Finland, the *Fritidsresor/Finnmatkat* case was the first merger case in which collective dominance was assessed under the merger control provisions. In this case, the FCA sought guidance mainly from EU case practice which was also incorporated into the first Finnish Merger Guidelines.[128] According to the Guidelines, Article 11d of the Act on Competition Restrictions did not make a distinction between a single and a collective dominant position.

As regards the question of whether the merger control provisions could be applied to a collective dominant position, the FCA also referred to Article 3(2) of the Act on Competition Restrictions which defined the concept of a dominant position, and also to the case practice based on the said provision. Contrary to the

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[125] It has been argued that this requires a period of one to two years. Faull and Nikpay (1999), p. 55.

[126] Jokinen (2002), p. 53.

[127] Jokinen (2002), p. 54. The same statement is provided in *Fritidsresor/Finnmatkat*, Case No 1076/81/99.

[128] Jokinen (2002), p. 54.

FCA, the Commission has not referred to Article 102 TFEU decisions, or its predecessor Article 82 decisions, in merger cases. Article 3(2) stated that "a dominant position shall be deemed to be held by a business undertaking or an *association of business undertakings*, who, either within the entire country or within a given region, hold an exclusive right or other dominant position in a specified product market so as to significantly control the price level of terms of delivery of that product, or who, in some other corresponding manner, influence the competitive conditions on a given level of production or distribution." Article 3(2) did not make a distinction between the concept of a dominant position and the context in which it was applied, i.e. the concept was similar in the context of the abuse of a dominant position and of the merger control.

As regards case practice based on Article 3(2) of the Act on Competitive Restrictions, the FCA stated, for example, in the *Alfons Håkans and Finntugs*[129] case, which concerned the abuse of a dominant position, that Alfons Håkans Oy (hereinafter Alfons Håkans) and Finntugs Oy (hereinafter Finntugs) had a collective dominant position in the market for harbour towing. The Competition Council (currently the Market Court) confirmed that several firms can jointly have a dominant position. An association of business undertakings referred to in Article 3(2) of the Act on Competition Restrictions could consist of a group of firms which follows an established common course of action if it can be demonstrated that the group acts for a common purpose and according to a mutually confirmed course of action. According to the Council, a precondition is that there are such economic links between firms that it is justifiable to assess them as a single economic unit.

The Council also stated that the fact that firms act in a uniform manner in oligopolistic markets is not sufficient. Cooperation must be conscious and planned. In this case, the Council stated that Alfons Håkans and Finntugs acted according to a unified business strategy and as a single economic unit. The Council concluded that the firms jointly had a dominant position in the market for harbour towing under Article 3(2) of the Act on Competition Restrictions. In addition to the economic links between the firms and the unified conduct in the market, the Council took into account, among other things, the strong market position vis-à-vis competitors and the lack of substitutes for customers.

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[129] *Alfons Håkans Oy and Finntugs Oy*, Case No. 23/359/1998 (hereinafter *Alfons Håkans and Finntugs*).

Conversely, in the *Telia Finland/Sonera/Radiolinja*[130] case, the FCA concluded that Sonera Oy (hereinafter Sonera) and Radiolinja Ab (hereinafter Radiolinja) did not have a collective dominant position in the national market for access to the telecommunication network. On the one hand, certain market elements such as the existence of only two national service providers, the homogenous nature of services and the existence of barriers to entry were considered to indicate the existence of collective dominance between the two firms. On the other hand, certain elements such as a rapid technical development, strong increase in demand, and the firms' different cost structures and financial strengths indicated the existence of competition. Competition for new subscribers would also increase competition and prevent unified conduct. In addition, no indications of a planned and conscious action between Sonera and Radiolinja were identified, either. The FCA concluded that the market situation as a whole did not support the existence of collective dominance.

The FCA's decision was appealed by Telia Finland Oy (hereinafter Telia) to the Competition Council. Telia required the Council, among other things, to confirm the existence of a collective dominant position between Sonera and Radiolinja. The Council sent a request to the Commission for a statement on this matter.[131] In its statement the Commission concluded that the existence of a collective dominant position is assessed on a case-by-case base and referred to factors such as technical development, growth of market, symmetry of market shares, cost structure and the existence of a punishment mechanism that are taken into account in the assessment. In accordance with the *Alfons Håkans and Finntuggs* case, the Council concluded that a precondition for the application of Article 3(2) of the Act on Competition Restrictions was that there were such economic links between firms that would justify considering them as a single economic unit. Also, the fact that firms act in a uniform manner in oligopolistic markets would not be sufficient: cooperation must be conscious and planned. However, without economic links firms' conduct would go beyond the scope of Article 3(2).

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[130] *Telia Finland Oy/Sonera Oy/Oy Radiolinja Ab*, Case No. 22/690/2000 (hereinafter *Telia Finland/Sonera/Radiolinja*).

[131] In its statement the Commission referred to the draft guidelines on market analysis and the assessment of significant market power, as well as the working document on market survey in the telecommunication sector. See the Commission working document on draft guidelines on market analysis and the calculation of significant market power under Article 14 of the proposed directive on a common regulatory framework for electronic communications networks and services (28 March 2001) and the Commission working document on the initial findings of the sector inquiry into mobile roaming charges (17 November 2000).

2.3 Role of Market Definition in Merger Control

2.3.1 Concept of Relevant Markets

A dominant market position exists in relation to the relevant product[132] and geographic markets. The purpose of market definition is to identify product and geographic markets that are relevant for the assessment of the competitive effects of mergers. In its assessment of relevant markets, the FCCA takes into account products that compete or could compete with the products of the merged entity and thereby constrain the exercise of market power by the merged entity.[133] The definition of relevant product and geographic markets is, however, less decisive under the SIEC test compared to that of the dominance test.

When defining the relevant product and geographic markets, the FCCA considers both the demand and supply side substitution. Demand substitution provides the most immediate and effective disciplinary force for market behaviour. A firm cannot have a significant effect on prices and other terms of delivery if customers can easily switch to substitutes available or suppliers located elsewhere. The FCCA identifies alternative sources of supply for the customers, i.e. alternative products and alternative locations of suppliers. Demand substitution is affected by different factors such as technical barriers, switching costs and time frame related to switching.[134]

Supply substitution is taken into account in the context of market definition if its effects are equivalent to those of demand substitution. The FCCA assesses whether other suppliers are able to increase supplies or switch production or distribution network in order to produce substitutes or provide alternatives sufficiently easily and in the short term and without incurring significant additional costs of risks. If these requirements are not met, the effect of supply substitution will be examined in the context of potential competition and market entry.[135]

When the FCCA examines the effects of a merger on competition it typically sends – at least in all major cases - written requests for information to market

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[132] The concept of product comprises also services.

[133] See also the first Finnish Merger Guidelines, p. 36.

[134] Finnish Merger Guidelines, p. 36; Commission Notice on the definition of the relevant market for the purposes of Community competition law (hereinafter the Notice on Market Definition).

[135] Finnish Merger Guidelines, p. 36; Notice on Market Definition; Oinonen (2010), p. 238.

participants. In these requests, relevant markets are addressed by questions which are based on the so-called SSNIP test, i.e. a "small but significant non-transitory increase in price". In other words, the FCCA asks customers how they would react to a hypothetical small but significant non-transitory change in prices.[136] However, in practice in most cases there is no need define relevant product and geographic markets definitely, but the definition can be left open.

2.3.2 Definition of Product and Geographic Markets

A relevant product market comprises all those products which are regarded as interchangeable or substitutable by the consumer, because of the products' characteristics, prices and the intended use.[137] Demand substitution can be assessed by using different types of elasticities. Cross-price elasticity measures how the demand of certain product reacts to the price change of another product. High cross-price elasticity between different products indicates that products belong to the same relevant market, whereas low cross-price elasticity indicates that they belong to the different markets.[138]

The reactions of consumers and customers to price changes may depend, for example, on the products' costs in relation to other costs faced by consumers and customers. If the costs of a certain product do not form a major part of their total costs, consumers and customers may react to a lesser extent compared to a situation in which the cost of a certain product would form a major part of the total costs.[139] When defining the relevant product market, the FCCA takes into account, for example, the differences in customer groups and the price differences of products. Products may be provided to different customer groups at different prices and in terms of delivery, even if the physical characteristics of the products could indicate that they belong to the same relevant market. In addition, strong brands may also indicate distinct product markets.[140]

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[136] For the SSNIP test, see e.g. Oinonen (2010), pp. 239-244.

[137] Finnish Merger Guidelines, p. 37. This definition is identical to section 6 of the Form CO relating to the notification of a concentration pursuant to Regulation (EC) No 139/2004. Form CO is an annex to Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings. A similar definition is also provided in the Notice on Market Definition.

[138] Finnish Merger Guidelines, p. 37.

[139] Finnish Merger Guidelines, p. 37.

[140] Finnish Merger Guidelines, p. 37.

The starting point for defining relevant geographic market is the area where the merging parties are involved in the supply and demand of relevant products. The relevant geographic market comprises an area where, on the one hand, the conditions of competition are sufficiently homogenous, and which, on the other hand, can be distinguished from neighbouring geographic areas, in particular, as the conditions of competition are appreciably different in those areas.[141]

Information about a distinct geographic market may derive from barriers to increase sales in certain geographic areas. These types of barriers may consist of the access to distribution or the costs associated with setting up a distribution network, and the existence of regulatory barriers arising from public procurement and technical standards. The pattern and evolution of trade flows may also provide information about the existence of a distinct relevant geographic market.[142]

Transport costs and transport difficulties that derive from the nature of products can affect the fact that customers and consumers located in a certain area do not supply products from other areas and that businesses between certain areas are not economically feasible. For inexpensive and bulky products transport costs may be a decisive factor for defining market. The relevance of transport is affected by the location of production plants of different manufacturers and price differences between different geographic areas.[143]

Other factors that are assessed in defining relevant geographic markets consist, *inter alia*, of the nature and characteristics of the products concerned. Some products can only be used in certain areas. Relevant factors also include consumer preferences, differences in firms' market shares between neighbouring geographic areas, the actual potentiality of customers to switch to suppliers located in other areas, substantial price differences or the differences between the distribution networks in different areas.[144]

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[141] Finnish Merger Guidelines, p. 37. This definition is identical to section 6 of the Form CO, cited above. A similar definition is also provided in the Notice on Market Definition; Oinonen (2010), p. 265.

[142] Finnish Merger Guidelines, pp. 37-38; Notice on Market Definition.

[143] Finnish Merger Guidelines, p. 38.

[144] Finnish Merger Guidelines, p. 38. A number of these factors are also provided in section 6 of the Form CO.

2.4 Anti-competitive Effects of Mergers in Oligopolistic Markets

According to the Finnish Merger Guidelines, the FCCA usually examines the effects that the merger is likely to have on market structures and analyses any potential anti-competitive effects of the merger and any potential countervailing factors, such as potential competition and efficiency gains.[145] Similar to the EU Horizontal Merger Guidelines, the Finnish Merger Guidelines divide anti-competitive effects into two main categories: non-coordinated effects and coordinated effects.[146]

The concept of non-coordinated effects, also termed unilateral effects, refers to the ability of a single firm to unilaterally increase prices without coordinating with its competitors. Non-coordinated effects basically include all anti-competitive effects which are not characterized as coordinated effects.[147] Non-coordinated effects can arise in different settings which differ by primary characteristics that distinguish firms and shape the nature of their competition.[148] There are two theories of non-coordinated effects. The first theory relates to markets where products are differentiated and the second theory to markets where products are relatively undifferentiated, i.e. homogenous, and firms are primarily distinguished by capacity which shapes the nature of their competition.[149] The concept of coordinated effects refers to the situation where competition is significantly impeded in oligopolistic markets through coordination and can be equated with collective dominance.

As regards coordinated effects, the Finnish Merger Guidelines state that in some circumstances a merger may increase the likelihood of firms engaging in coordinated behaviour or make coordination easier or more effective for firms

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[145] Finnish Merger Guidelines, p. 71.

[146] Finnish Merger Guidelines, pp. 74-79. In the Draft EU Horizontal Merger Guidelines, the Commission divided mergers in oligopolistic markets into collusive and non-collusive oligopolies, describing the nature of the potential detrimental effects caused by the merger. See OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 312. The division was assessed to be symmetrical with the economists' approach. However, the division was abandoned and in the final EU Horizontal Merger Guidelines the harmful effects were divided into coordinated and unilateral effects, the latter being also possible in the oligopolistic market context.

[147] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 23.

[148] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 23.

[149] Finnish Merger Guidelines, pp. 77-78. For theories of unilateral effects, see e.g. US 1992 Horizontal Merger Guidelines, Section 2.21.

that were coordinating before the merger.[150] As regards the assessment of coordinated effects, the Guidelines provide a list of factors that may influence the likelihood of coordinated effects. The factors that are listed in the Guidelines consist, among other things, of highly concentrated markets, a small number of firms in the market, the symmetry of firms in terms of market shares and cost structures, homogenous product, arrangements which promote coordination, stable market shares, stable demand and costs, as well as the fact that the merger involves a "maverick".[151]

The Finnish Merger Guidelines note that the list is not exhaustive, nor that all of the factors need to be present. In addition, the factors are not, if taken separately, necessarily decisive in giving rise to significant anti-competitive coordinated effects. The Guidelines further note that the list is an example of the kinds of factors that the FCCA takes into consideration when assessing the likelihood of coordinated effects.[152]

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[150] Finnish Merger Guidelines, p. 77.

[151] Finnish Merger Guidelines, pp. 78-79. The Guidelines define a "maverick" as a firm that "has more of an impact on competitive dynamics than its market share suggests or a recent entrant or a strong potential competitor that is attempting to enter the market and is likely to cause considerable competitive pressure on the undertakings that already operate on the market in the future".

[152] Finnish Merger Guidelines, p. 79.

3 ROLE OF MARKET ELEMENTS

3.1 Economics and Oligopolistic Markets

Economics, in particular economic analysis and evidence, has become increasingly important in competition policy.[153] In the merger assessment, the competition authority must conclude whether the merger would result in competition concerns. One of the key questions is then the level of likelihood that needs to be proven in order to make this conclusion and the types of tools economics may provide.

Economics may provide tools for the merger assessment in terms of assumptions, models and indicators and a basis for the assessment criteria. Economics may also indicate the level of likelihood of competitive concerns that arise under certain conditions and be applied to formulate rules and determine safe harbours. The level of likelihood relates to the standard of proof the competition authorities have, i.e. whether or not the merged entity has the ability and incentive to increase prices. In addition, economics may provide useful concepts and models, exclude certain outcomes and provide relevant arguments.[154] For the purposes of this study, economics also provides a common basis for interregulation between different regimes.

Economics provides concepts such as market power, entry barriers and sunk costs which are used in merger assessment and evaluated according to the competitive effects of a merger on the market. Competition policy is an economic policy with a concern with structures, conduct and effect, also termed outcome or performance.[155] Economics, especially the theory of competition, represents views on how competition laws will stand in relationship to competition concerns.[156]

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[153] Peeperkorn (1999), p. 4. This is clearly seen in the recent guidance from the Court of Justice as well as in the speeches of Commissioner Monti. The establishment of the post of Chief Economist is one of the ways to emphasise the importance of economics in merger analysis.

[154] Peeperkorn (1999), p. 4.

[155] Peeperkorn (1999), p. 4.

[156] Competition laws generally emphasise the maintaining of workable or effective competition. The definition takes into account the imperfection of the market and the degree of competition which will satisfy public policy. According to the classical theory of competition, free competition does not and cannot exist in practice. The concept of "workable competition" was fairly closely defined by Clark (1940); it now

As regards oligopolistic markets, a number of assumptions relate to the market structure and market behaviour. Assumptions regarding market structure mainly derive from the so-called Structure-Conduct-Performance framework [157] (hereinafter the SCP framework), whereas those regarding market behaviour derive from game theory. Assumptions which relate to the effects of a merger on competition are based on the theory of harm. [158] Economic analysis has shown that the focus of the analysis should be on the coordinated effects of the change in the structure and dynamics of markets.[159] Coordination can be assessed on a sliding scale. When a market exhibits a certain degree of coordination, the focus is on whether the merger moves coordination up on the scale, towards a higher degree of coordination.[160]

Economic theories and models are themselves built on and around different assumptions.[161] At one extreme of the oligopoly models is the Cournot model. It assumes that each firm determines its own profit maximizing output on the basis that the other would hold its short-term output unchanged.[162] Under the Cournot equilibrium, each oligopoly member's choice of output is profit-maximising given the output of the other firms.[163] This leads to a market price below the monopoly level but well above the competitive level. However, if the assumption that other firms would not change output is relaxed, the model can result in any price between the monopoly and the competitive level. [164] In this model, the competitive parameter is the quantity, not the price. The model also assumes that the product is homogeneous, the demand curve linear, marginal costs vague and that there are barriers to entry.[165] At the other extreme is the Bertrand model. According to this model each firm assumes that the other firms would keep their prices constant and it then determines its own profit maximizing price to

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has no independent meaning, but rather is connected to the legal system or the market of which it forms part. Frazer (1992), p. 6. The concept was further developed by Kantzenbach in 1960's. For example, the Commission has defined workable competition as "the right amount of competition". The Court of Justice has defined it as "the degree of competition necessary to ensure the objectives of the Treaty". The degree of competition will vary according to the nature of the market. Frazer (1992), p. 6. In general, there should be enough competition or possibilities for competition to maintain the market mechanism.

[157] The framework is also termed paradigm.

[158] Peeperkorn (1999), p. 4.

[159] Amelio et al. (2009), p. 93.

[160] Amelio et al. (2009), p. 93.

[161] Peeperkorn (1999), p. 4

[162] Mehta (1999), p. 56; Bishop and Ridyard (2003), p. 361.

[163] Camesasca (1999), p. 17.

[164] See Scherer and Ross (1990), p. 206; Peeperkorn (1999), p. 25.

[165] See Carlton and Perloff (2000), p. 157; Kuoppamäki (2003), p. 360.

undercut its rival.[166] Neither quantity nor price competition seem to adequately explain all real world situations. Intense price competition is relevant when demand is below the expected level with the effect that firms have unused capacity. When market demand is at the level of firms' capacities and it takes time to expand production, firms may engage in quantity competition.[167]

Assumptions, however, do not cover all real world situations and when they are changed the outcome of a model may be different. Economics may not give a clear and definitive answer to what will happen in a market as a result of a merger but tell the most plausible story. Oligopolistics markets are argued to be the clearest example of the weak guidance offered by economic models. Oligopolistic markets are complex and economic models reflect the diversity of oligopolistic outcome.[168] An important part of writing the most plausible story consists of analysis of the factors that either enhance or decrease the possibilities of collusion and choice of the model and specifications that best reflect the actual market conditions.[169]

This chapter discusses the tools and evidence provided by economics for merger control. The focus of this chapter is on structural elements, such as the market structure, and behavioural elements, such as the role of the punishment mechanism and the role of information and communication in the market.

3.2 Characteristics of Oligopolistic Markets

Oligopolistic markets refer to concentrated markets which are characterized by a limited number of firms and barriers to entry.[170] The number of firms is at least two, which refers to duopoly, with the maximum number not being clearly

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[166] Bishop and Ridyard (2003), p. 361. The Cournot and Bertrand models are complementary to each other. The assumptions can be complemented by game theory. The model developed by Stackelberg in 1934 emphases the coincidence of the decisions that the firms make. The firm determines its output. The other firms then optimize their output according to the first firm. The game will go on until the market achieves equilibrium. All three models are, however, static: market structure determines market conduct and performance. See Kuoppamäki (2003), p. 363; Mehta (1999), p. 56.

[167] Mehta (1999), p. 56.

[168] Peeperkorn (1999), pp. 4, 25; Scherer and Ross (1990), p. 206.

[169] Peeperkorn (1999), p. 25. For more extensive introductions, see Scherer and Ross (1990). See also Tirole (1988).

[170] EU Horizontal Merger Guidelines, para 25, footnote 29; Drauz (2000), p. 2; Peeperkorn (1999), p. 24.

determined.[171] The main characteristic of oligopolistic markets is that firms realise or believe that their individual behaviour regarding output and price influences the market outcome, and may therefore provoke reactions from other firms.[172] Because the behaviour of one firm in oligopolistic markets has an appreciable impact on the overall market conditions, and therewith indirectly on other firms, the members of an oligopoly are interdependent.[173] In addition to concentrated markets, economic analysis identifies a number of other factors that are relevant to the merger assessment in oligopolistic markets. These factors consist, for example, of the elasticity of demand, market transparency, firm and product homogeneity, the presence of mavericks, the characteristics of buyers, excess capacity and the ease of entry.[174] In addition, it has been argued that the finding of collective dominance requires that there is no effective competition either among the members of an oligopoly, or between the members of an oligopoly and other firms in the market.[175] These two situations are termed internal and external competition.

In oligopolistic markets, the result of the market - in the form of price or quantity - can range anywhere between the extremes of monopoly and perfect competition.[176] Firms with significant market shares in oligopolistic markets may operate just as anti-competitively as markets dominated by a single firm.[177] Effective competition may be significantly impeded as the result of the exercise of market power by either one firm behaving alone or more firms behaving jointly to an appreciable extent independently of other competitors and of consumers.[178] For example, a tight oligopoly can produce the same market performance as a single dominant firm, with anti-competitive effects on prices, output and innovation.[179] Effective competition may also be significantly impeded when the

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[171] Peeperkorn (1999), p. 24.

[172] Peeperkorn (1999), p. 24. OECD, Competition Enforcement in Oligopolistic Markets, Issues Paper by the Secretariat, DAF/COMP(2015)2, p. 3; Whish and Bailey (2012), p. 561.

[173] EU Horizontal Merger Guidelines, para. 25, footnote 29.

[174] Bishop (1999), p. 39; Nera Competition Brief (1988), p. 3.

[175] Temple Lang (2002), p. 1.

[176] Bundeskartellamt (2001), p. 16.

[177] Cook and Kerse (1996), p. 133; Commission, Green Paper (1996), p. 23; Lowe (1995), p. 149; Christensen et al. (1999), p. 248.

[178] Commission XXIInd Competition Report, p. 138.

[179] It has only been in the period following the adoption of the Merger Regulation that the Court and the Commission have begun to explore seriously the circumstances in which those rules might be used to police oligopolistic markets. Cook and Kerse (1996), p. 133; Commission, Green Paper (1996), p. 23; Lowe (1995), p. 149. For the different types of oligopolies, i.e. tight oligopoly and loose oligopoly, see e.g. Oinonen (2010), p. 39.

merger eliminates the competitive constraint that the merging parties have been exercising against each other. However, oligopolistic markets can also be highly competitive.[180] The existence of an oligopoly does not necessarily mean that effective competition cannot take place.[181]

There is no single model for assessing oligopolies but the models are context-specific.[182] Whether a merger results in competition concerns therefore depends on the specific conditions of an individual case.[183] Competition concerns in oligopolistic markets are often referred to as *coordinated effects*, *collective dominance* or *tacit collusion*. For the purposes of this study, these concepts are used synonymously. A common denominator to all these concepts is market power, i.e. the ability to increase prices above the competitive level. Therefore, market power is discussed in the following sections.

3.3 Market Power as a Source of Competition Concerns

3.3.1 Definition of Market Power

The economics of competition is about market power. Of special interest is the nature of market power, the way it is created, i.e. sources of market power, and its effect.[184] In addition, of interest is how market power is measured, i.e. what are the indicators of market power. Market power can be defined as the firm's ability to increase prices. Hence, the definition is based on its effects, i.e. a tentative price increase. As a result of a certain degree of market power, price increases become more likely.[185]

Mergers which provide a firm with the ability to raise price without a sufficient threat, assuming there are significant barriers to entry, can be anti-

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[180] Christensen et al. (1999), p. 248.

[181] Cook and Kerse (1996), p. 133; Commission, Green Paper (1996), p. 23; Lowe (1995), p. 149.

[182] Gal (2003), p. 156; Decker (2009), p. 40.

[183] Bundeskartellamt (2001), p. 16.

[184] Peeperkorn (1999), p. 9.

[185] The concept of market power itself, however, has been a target of criticism. For example, in the OECD Roundtable it was argued that there is a need to move away from looking at market power alone, and, instead, consider the impact of a merger on consumer welfare or total economic welfare. Many mergers that increase market power to some extent will in fact make consumers better off in the long run by reducing prices and increasing output. OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 333.

competitive.[186] The *economic* meaning of market power relates to the power to raise price above the competitive level, i.e. the level which would prevail in competitive markets, and, at least for a significant period, to obtain supra-normal profits. [187] In the short run, this means the ability to profitably set the price above marginal cost[188] and, in the long run, above the average total cost.[189] A firm with market power may raise its price by reducing its own output or by making competitors reduce theirs.[190] Another, more complex, definition refers to the ability of a firm to act independently of its competitors, suppliers and ultimately its customers. Market power has also been defined as the ability to act differently from what would be expected under the conditions of effective competition.[191]

Hence, the basic element in identifying and assessing market power is to analyse if a firm's output or price setting behaviour affects the market price or output.[192] It is useful to analyse market power as an ability to influence the market price. Methodologically, this is the most straightforward way and directs attention to a firm's incentive to set output on the level that takes into account the elasticity of demand. A firm no longer looks at whether the price covers its costs at the margin, thereby satisfying all those customers ready and willing to pay a price that covers the marginal cost. Instead, as a profit maximizer, a firm will raise the price to a level on which it earns on each incremental sale at least as much as its marginal cost. Output is set at the point on the firm demand curve where marginal costs equal marginal revenue.[193] With a downward sloping demand

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[186] Pitofsky (2000), p. 3.

[187] The price increase should be profitable for a significant period of time. Under the old Merger Regulation, a dominant position could have been established when the merged entity was, with high likelihood, able to obtain supra-normal profits for a period longer than two years. However, under Article 81 and 82 (currently Articles 101 and 102 TFEU) normally also shorter periods are taken into account. Peeperkorn (1999), p. 9.

[188] See, e.g. Camesasca (1999), p. 14; Peeperkorn (1999), p. 9; Kuoppamäki (2003), p. 299.

[189] Peeperkorn (1999), p. 9.

[190] Peeperkorn (1999), p. 9.

[191] This definition would mean that the SLC test assesses precisely this "scope of action which is not sufficiently controlled by competition" which has usually been used to define "dominant position" in EU merger control. See OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 62.

[192] Firms able to sell at the prevailing conditions on the market, whatever quantity they choose, have little or no market power, whereas those with market power can no longer do so or only to a limited extent. Mehta (1999), p. 52.

[193] Mehta (1999), p. 53. A monopolist sets the price at that point on his demand curve where marginal cost equals marginal revenue. Camesasca (1999), p. 17.

curve, for any output level, marginal revenue is less than price: it follows that at its profit maximizing output the firm's price will exceed its marginal cost.[194]

This type of pricing policy is only possible if a firm does not face such a pressure from competitors that a reduction in its output would easily be covered by them. Market power cannot arise if entry is easy or profitable or when markets are otherwise contestable. In certain situations, however, a number of conditions such as economies of scale may imply that the most efficient plant size is relatively large in relation to demand and the production tends to be in the hands of a small number of players as well as there being barriers to entry of some significance. In a situation when entry is constrained, market power will enable some firms to drive a wedge between prices and marginal costs. If this is sustained, prices will also diverge from average costs. If entry is not possible, a monopolist is unlikely to deviate much from the monopoly price. If entry is only partly blocked, a monopolist's strategy may be to limit pricing.[195]

3.3.2 Creation and Sustainability of Market Power and Effects of Market Power

The creation of market power and its effect can be approached by a static or dynamic welfare analysis. Static welfare analysis assumes that the level of technology is constant and ignores the effects of market power on innovation. Dynamic welfare analysis takes into account that markets evolve over time due to new technologies and new or improved products.[196] A static welfare analysis[197] concentrates on the effects of market power on efficiencies - allocative and productive efficiencies - and therewith on total welfare. This is measured in terms of consumer surplus and company profits.[198] A consumer surplus loss will occur where consumers willing to pay the price that would cover the marginal cost are not supplied. This normally occurs in the situation where prices are raised above marginal cost.[199] The static inefficiency that results is analysed in terms of a comparison between the actual and minimum costs of production and in terms of price set above marginal cost of supply.[200] The creation or sustainability of

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[194] Mehta (1999), p. 53.

[195] Peeperkorn (1999), p. 32.

[196] Peeperkorn (1999), p. 39.

[197] Welfare economics is a branch of microeconomics.

[198] Peeperkorn (1999), p. 10.

[199] Mehta (1999), p. 38.

[200] Mehta (1999), p. 39.

market power and the effects of market power relate to market structure and conduct.[201]

Firms can have different degrees of market power.[202] Market power can be measured on a market power scale, where perfect competition and monopoly are the two extremes at the ends of the scale. Between these two extremes, the most important intermediate market form is an oligopoly.[203] The outcome of oligopolistic behaviour can vary from perfect competition to pure monopoly or anywhere between.[204]

Even if the conditions of perfect competition or monopoly are rarely fulfilled, the models are still useful.[205] The model of perfect competition highlights the concepts of allocative and productive efficiency. It can also be applied as a benchmark against which the competitiveness of actual markets is measured.[206] In perfect competition, productive efficiency occurs: with given resources the maximum output is produced.[207] Any new cost saving technique that is introduced will be copied immediately and a new equilibrium is realized at a lower price.[208] In an equilibrium allocative efficiency occurs: welfare is maximized as consumer surplus is at its largest.[209]

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[201] Peeperkorn (1999), p. 9.

[202] It has been stated that "In theory the appropriate measuring rod would be the net present value of monopoly profits a company can make. The net present value is today's value of the profits of this period and all future periods. It depends therefore on the monopoly profit per period, on the number of periods a monopoly profit can be sustained before entry or expansion by competitors takes the profit away, and on the discount rate against which future profits are evaluated." See Peeperkorn (1999), p. 9.

[203] Peeperkorn (1999), p. 19.

[204] Peeperkorn (1999), p. 25. It has also been stated that "with oligopolies everything goes".

[205] Peeperkorn (1999), pp. 19, 21.

[206] Peeperkorn (1999), pp. 19, 21.

[207] This results from every company producing at the minimum average total cost. A less efficient company will make a loss and exit the market and a new efficient entrant will take its place. Peeperkorn (1999), p. 20.

[208] Peeperkorn (1999), p. 21.

[209] If less output than the equilibrium quantity was produced, there would be buyers with a reservation price above the equilibrium price. These buyers would be willing to pay more than it costs to produce more units. Welfare could thus be increased by expanding output. Allocative efficiency is reflected at firm level by every firm obtaining a price equals to its marginal costs. Producing one unit more would mean that the extra costs exceed the price it receives; in other words, the extra costs exceed the reservation price of the marginal consumer. Peeperkorn (1999), p. 21.

The model of monopoly highlights a number of important concepts and provides the clearest example of what competition policy tries to prevent[210] from being created, as there are only limited means for effective actions once a monopoly exists.[211] Monopoly is thus an extreme against which the anti-competitive effects can be measured.[212]

Purely monopolistic markets are characterized by a single supplier with many buyers and barriers to entry. A firm operating under the conditions of monopoly will be a price setter. Demand that exists in the market is a demand for the products of a monopolist. [213] A monopolist can determine the market price by changing its output along the demand curve. Due to the barriers to entry, a monopolist can maximize its profits or pursue other goals. [214] In perfect competition, a change in the firm's output does not have any effect on market price because the output is small compared to the total output of the market. A single firm cannot supply the whole market, either.

A monopolist sells quantity which is less than the output under which competition results in price increases. There are at least four types of identified competition concerns that result from a monopoly. Firstly, a monopoly results in loss of welfare as a part of the consumers' surplus is lost. Secondly, there is a transfer of income from consumers to monopolist. With the higher price, consumer surplus turns into the monopolist's profit. There are different approaches on whether the monopolist's profit should be counted as a welfare loss or not. One approach is that the society's welfare as a whole does not change (total welfare approach). Another approach is that as the goal of competition policy is generally stated to protect competition for the interests of consumers, a monopoly must be seen as negative (consumer welfare approach).[215] Allocative inefficiency is also evidenced by the difference between price and marginal cost. As the monopoly price is higher than the marginal costs, welfare could be

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[210] Peeperkorn (1999), pp. 19, 21.

[211] Peeperkorn (1999), p. 32.

[212] However, in certain circumstances monopoly is seen to lead to advantages for consumers. For example, economies of scale may result in only one firm being able to produce at minimal cost, i.e. a natural monopoly. In this case, an increase of producers would lead to inefficiencies. The dead-weight loss and the price charged by the monopolist may compare favourably with the welfare loss due to the higher costs and the price level under competitive conditions. Peeperkorn (1999), p. 24.

[213] Peeperkorn (1999), p. 21.

[214] Peeperkorn (1999), p. 21.

[215] Peeperkorn (1999), p. 22.

increased by producing extra units. The consumers are willing to pay the price that exceeds the production cost.[216]

Thirdly, a monopolist may become slow and inefficient, instead of maximizing profit. This type of internal inefficiency, X-inefficiency,[217] leads to extra welfare loss.[218] Fourthly, a loss of welfare may also be caused by the resources wasted by a monopolist while defending its position and by those who attack this position.[219] A monopolist may raise and maintain barriers to entry by different means such as excess capacity or excessive product differentiation. In theory, these actions may require all monopoly profits. However, the costs are not necessary recognised as welfare loss. A part of the costs can be seen as the price of vigorous competition. This is true when competition is seen as rivalry, for example, a fight for temporary advantages or gaining market power. However, most competition authorities are concerned about dominant firms running up costs to maintain excess capacity.[220]

The models of monopoly and perfect competition emphasize market structure and omit conduct. In the SCP approach the models are quite straightforward: a certain market structure leads to a certain market performance.[221] However, in oligopolistic markets conduct becomes an important factor. It also complicates the merger assessment.[222] An explanation or prediction of a firm's behaviour requires the analysis of structural factors of the market (SCP) and the incentives of firms (game theory).

It has been stated that in static analysis there is a clear total welfare loss associated with the *exercise* of market power. As static analysis is concerned solely with the allocation of resources in the context of fixed technology and a given cost situation, it does not incorporate technological development or innovation. As innovation generates welfare gains due to dynamic efficiencies

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[216] Peeperkorn (1999), pp. 22-23.

[217] The phenomenon of internal inefficiency was termed X-inefficiency by Leibenstein. It can be realised in e.g. high salaries and too many employees. See, e.g. Peeperkorn (1999), p. 23.

[218] Peeperkorn (1999), p. 23. The X-inefficiency is reflected in higher average total costs and higher marginal cost curves. This results in a new equilibrium with the lower quantity and the higher price.

[219] The effect can be named the price of success. See Peeperkorn (1999), p. 23.

[220] Peeperkorn (1999), pp. 23-24.

[221] The only behavioural assumption relates to profit maximization. Peeperkorn (1999), p. 24.

[222] Peeperkorn (1999), p. 24.

and as the market structure may be considered to affect the rate of innovation over the long run, a welfare analysis of market power needs to take into account both static and dynamic efficiencies – and any trade-off between them. Dynamic efficiency is analysed in terms of how total surplus evolves over time with the introduction of innovation.[223]

3.3.3 Identification of Market Power

Economics suggests a number of different indicators for market power such as the Lerner index and the elasticity of demand. [224] The concept of market power as an ability to set a price above marginal cost is formalised in the Lerner index.[225] The index is defined as the firm's margin[226] in relation to the current price set by the firm.[227] It measures the proportional deviation of price at the firm's profit-maximising output from the firm's marginal cost at the output.[228] The index thus indicates the deviation from perfect competition. Market power is measured by the extent of price marginal.[229] The standard economic concern interprets an increase in monopoly power as an increase in the Lerner index.[230] The more competitive the market conditions are, the more the price will move towards marginal costs and the lower the Lerner index will be. In contrast, the higher the index is, the more market power the firm possesses.[231] When a firm can profitably set price above marginal cost, the Lerner index is positive. The closer the index is to one, the more the firm possesses market power. In a monopoly, the index is one, whereas in perfect competition it is zero.[232]

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[223] Mehta (1999), p. 39.

[224] Mehta (1999), p. 44.

[225] Camesasca (1999), p. 17.

[226] The firm's margin is a microeconomic datum and, while in principle ascertainable, it is usually not known. Peeperkorn (1999), p. 4. Typically, the relevant margin (m) is the difference between price (p) and the incremental cost (c) of supplying one more unit of output expressed as a percentage of price (m=(p-c)p) See, the EU Horizontal Merger Guidelines, para. 28, footnote 36.

[227] Peeperkorn (1999), p. 4. The index is calculated in the following way: L=(P-MC)/P, in which P is price and MC marginal costs. Määttä (2001), p. 66.

[228] Camesasca (1999), p. 17; Kuoppamäki (2003), p. 299. The price-cost mark-up is also called the Lerner index of market power (Lerner 1934). The price-cost margin demands only the elasticity of demand the monopoly faces. See Carlton and Perloff (2000), p. 92.

[229] Kuoppamäki (2003), p. 299.

[230] Camesasca (1999), p. 17.

[231] Määttä (2001), p. 66.

[232] Kuoppamäki (2003), p. 299. See also Carlton and Perloff (2000), p. 92.

The Lerner index could be determined directly, i.e. without measuring the firm elasticity of demand, if marginal cost were known. However, marginal cost is a hypothetical construct and very difficult to determine in practice.[233] Due to these difficulties, the calculation of the Lerner index is difficult. Even if marginal costs could be defined, it is questionable to which level the index should be set in order to determine a dominant market position. A single value cannot be set because the level of barriers to entry and the speed of the technical development differ within markets.[234] There is a link between the Lerner index and the concentration ratio as measurements of market power.[235]

Market power can also be determined by direct price elasticity,[236] also termed own-price elasticity. Another concept regarding price elasticity is the cross-price elasticity of demand,[237] also termed the cross-elasticity of demand, and it is usually applied in the context of market definition. However, there is a relationship between cross-elasticity and direct elasticity. If other elements are the same, the larger a cross-elasticity of demand is, the larger in absolute value is the direct elasticity of demand.[238] If the elasticity of demand is known with some precision, something could be said about the firm's margin.[239] Where the demand elasticity is low, the firm's margin is high, and vice versa. However, the elasticity of demand is usually not known, at least not with sufficient precision.[240] Elasticities reflect whether there is a potential to make profitable increases taking into account the reactions of those producing the closest substitutes.[241]

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[233] Camesasca (1999), p. 17.

[234] Määttä (2001), p. 66.

[235] See Encaoua and Jacquemin (1980), pp. 87-105.

[236] Own-price elasticity measures the extent to which demand for a product changes in responses to the change in the price of the product itself. See, the EU Horizontal Merger Guidelines, para. 29, footnote 38.

[237] The cross-elasticity of demand is the percentage change in quantity demanded in response to a 1% change in the price of another product. There is a lot of discussion in court decisions as to the importance of cross-elasticity of demand defining markets. Courts are argued to use the term loosely to indicate that products are substitutes. Carlton and Perloff (2000), p. 615. The cross-price elasticity of demand measures the extent to which the quantity of a product demanded changes in the response to a change in the price of some other product, all other things remaining equal. Cross-price elasticity is applied as one of the ways to delineate the relevant market, SSNIP test. See the EU Horizontal Merger Guidelines, para. 29, footnote 38.

[238] Carlton and Perloff (2000), p. 615.

[239] At its profit-maximizing equilibrium a firm's margin equates to the reciprocal of the elasticity of demand facing it. Mehta (1999), p. 44.

[240] Mehta (1999), p. 44.

[241] Mehta (1999), p. 53.

In the absence of measures such as the Lerner index and the elasticities of demand, market power is approximated by reference to the relative market position of the merged entity vis-à-vis its competitors. Market share is thus an approximate measure [242] and forms a substitute for direct measures. The structural approaches view large market shares in themselves as signifying market power. Furthermore, the ability to engage in anti-competitive conduct is positively related to market share. For a firm to be considered dominant, it must have a large market share, conventionally more than 50% of sales, and it must set the market price. The practical approach based on market shares can be considered a heuristic way of taking into account price elasticity of demand and reaching a similar conclusion on the identity of the firms with market power.[243]

One of the main assumptions – that market concentration increases market power with the effect of a price increase – is also relevant here. Concentration indices may therefore provide a possible tool to identify market structures characterized by an oligopoly or a firm with a dominant position.[244] Increased market concentration is recognised as one of the competition concerns brought about by horizontal mergers.

Market concentration can be defined by the HHI[245] or by concentration ratios such as the four-firm concentration ratio (hereinafter CR4). [246] The HHI is particularly applicable to the structural assessment of oligopolistic markets and is considered as a quantitative application of the oligopoly models. Compared to the CR4, the HHI also better indicates the relevant changes in the market structure.[247] Unlike the CR4, the HHI reflects both the distribution of the market shares of the top four firms and the composition of the market outside them.[248] The HHI gives proportionately greater weight to the market shares of larger

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[242] Significant market shares are argued to indicate that a firm is either the cost leader if the product is homogenous or has both cost and product range advantages in a differentiated product market. Mehta (1999), pp. 44, 54.

[243] Mehta (1999), p. 54.

[244] Kuoppamäki (2003), p. 317.

[245] EU Horizontal Merger Guidelines, para. 16; Hautala (2002), p. 46; ICN Analytical Framework, US Annex 2002, p. 5. The HHI is calculated by summing the squares of the individual market shares of all the firms in the market.

[246] This means that market power is measured by calculating the market shares of the top four. See Mehta (1999), p. 54. "Concentration ratios measure the aggregate market share of a small number (usually three or four) of the leading firms in the market." See, the EU Horizontal Merger Guidelines, para. 16.

[247] Kuoppamäki (2003), p. 317.

[248] ICN Analytical Framework, pp. 5, 11; The U.S. Department of Justice Merger Guidelines (1984). Revised and reissued June 14, 1984. Reprinted in 4 Trade Reg. Rep. (CCH) section 13,103, (hereinafter 1984 Guidelines), para 3.1

firms,[249] reflecting thus their relative importance in the competitive process.[250] In practice, it is sufficient to include the market shares of major firms, as the market shares of very small firms do not affect the HHI significantly.[251] The HHI has also some drawbacks.[252] It does not take into account that very different markets can produce similar results. Even if a distinction is made between markets characterized by monopoly and by oligopoly to a sufficient extent, the index does not take into account that competition can be promoted by mergers between firms other than the strongest members of an oligopoly.[253]

While the absolute level of the HHI can give an initial indication of the competitive pressure in a market post-merger, the change in the HHI (known as the 'delta') is a useful proxy for the change in the concentration directly brought about by the merger.[254] The HHI ranges from close to zero in an atomistic market to 10 000 in a pure monopoly.[255] The post-merger HHI is calculated based on the assumption that the merging parties maintain their respective market shares.[256]

The HHI is explicitly referred to in the EU Horizontal Merger Guidelines and it is applied in recent case practice.[257] The Guidelines provide certain numerical assumptions on the competitive effects and safe-harbours based on the HHI. The HHI was also applied by the Commission prior to the adoption of the SIEC test and the explicit reference in the Guidelines. Similar to the EU Horizontal Merger Guidelines, the Finnish Merger Guidelines refer to the HHI and the CR as concentraion ratios. However, the Finnish Merger Guidelines do not provide any numerical presumptions based on the HHI.

The concentration ratios are based on the SCP hypothesis according to which market concentration results in price increases if markets are not contestable.

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[249] The EU Horizontal Merger Guidelines, para. 16.

[250] ICN Analytical Framework, p. 5, 11-12; US 1984 Guidelines para. 3.1.

[251] EU Horizontal Merger Guidelines, para. 16. See also US 1992 Horizontal Merger Guidelines.

[252] Fishwick (1993), pp. 85-86; Kuoppamäki (2003), p. 318.

[253] Fishwick (1993), pp. 85-86; Kuoppamäki (2003), p. 318.

[254] EU Horizontal Merger Guidelines, para. 16. The Guidelines further state in footnote 19 that the increase in concentration as measured by the HHI can be calculated independently of the overall market concentration by doubling the product of the market shares of the merging firms. For example, a merger of two firms with market shares of 30% and 15% respectively would increase the HHI by 900 (30 x 15 x 2 = 900).

[255] EU Horizontal Merger Guidelines, para. 16, footnote 18.

[256] EU Horizontal Merger Guidelines, para. 16.

[257] In the Form CO, i.e. the notification form applied in EU merger control, the notifying party or parties have to provide information about the HHI and the increase in HHI.

The HHI is a meaningful approach if market concentration is assumed to lead to price increases on average and that the structural control of oligopolies is considered meaningful. It should, however, be remembered that the index only models the relative concentration degree mathematically and it does not provide any information on what is the degree of concentration that gives reason for an intervention.[258] On the basis of information provided by these indicators, it is possible to make an assessment on whether or not the conditions for dominance may be attained.[259]

It has been stated that "single and collective dominances tend to lead to a high degree of market power where the firm or firms which account for a high share of the market output, are able to set the level of market prices and hence also the supply responses of the remaining necessarily small competitors, and are also able to limit entry." [260] Although it is possible to establish a link between concentration and market power, the concentration indices are not a determinant factor. [261] Market shares and market concentration do not provide sufficient information about the competitive effects of the merger in oligopolistic markets. According to economic theories, the market concentration does not always increase market power nor make the collusion coordination easier. It could be asked whether a degree of market power that is significant but below that of a dominant position has a useful role in competition economics.[262]

3.4 Theories of Harm in Oligopolistic Markets

3.4.1 Coordinated Effects

Mergers in oligopolistic markets may result in coordinated effects or non-coordinated effects, also termed unilateral effects. [263] Economics also use concepts of non-cooperative and cooperative effects, the latter being, in effect, tacit collusion.[264] Coordinated effects are changes in the actions of the merging

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[258] Kuoppamäki (2003), p. 319.

[259] Mehta (1999), p. 54.

[260] Mehta (1999), p. 54.

[261] The link between the Lerner index and concentration ratios as measurement concepts of market power has been developed by Encaoua and Jacquemin. See Encaoua and Jacquemin (1980), pp. 87-105; Camesasca (1999), p. 17.

[262] Mehta (1999), p. 60.

[263] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 324.

[264] Lexecon Competition Memo. The Airtours Case. 12 November 1999.

parties that would be profitable for them as a result of the merger only if the changes are accompanied by alterations in the actions of the non-parties that are motivated in part by fears of retaliation.[265] The ability to increase prices depends on the actions of competitors. Therefore, coordinated effects involve some degree of accommodation by competitors, whereas unilateral effects do not.[266] Unilateral effects are discussed in section 3.4.2.

Coordinated effects are sometimes also termed coordinated interaction. Similarly to coordinated effects, coordinated interaction[267] is defined as being comprised of actions by a group of firms that are profitable for each of them only as a result of the accommodating reactions of others. This behaviour includes tacit or express collusion, and may or may not be lawful in and of it. Coordinated interaction extends beyond explicit collusion or concerted practice[268]. It also includes tacit collusion that might not in itself be illegal, i.e. mere conscious parallelism. How far that runs depends on exactly what is meant by "accommodating reactions".[269] It has been argued that there is a grey area between explicit collusion and mere conscious parallelism that goes beyond consious parallelism but does not involve an expressed agreement.[270] The merged entity is only able to raise its prices if its rivals match this increase and if every firm in the oligopoly fears a return to competitive prices and profits if it undercuts its rivals.[271] A merger may result in coordinated effects where, through the elimination of competitive constraint and the consequent change in the market structure, it could facilitate collusion and thereby lead to coordinated price increases.

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[265] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 22; See also Willig (1991), pp. 292-293.

[266] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, pp. 61-62; Chistensen and Rabassa (2001), p. 229.

[267] The concept of coordinated interaction is applied, among others, in the US merger control.

[268] The Commission has recently discussed the concept of concerted practice in Case COMP/AT.40098 - *Blocktrains*. In this case, the Commission states, among other things, that "conduct may fall under Article 101(1) of the Treaty as a concerted practice even where the parties … knowingly adopt or adhere to collusive devices which facilitate the coordination of their commercial behavior", para. 28.

[269] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 22.

[270] OECD Roundtable on Unilateral Disclosure of Information with Anticompetitive Effects, DAF/COMP(2012)17, p. 30. It has been argued that it is extremely difficult to distinguish between conscious parallelism and collusion. Conscious parallelism has been described as actions that are based on tendency to coordinate policies which is inherent in oligopolistic markets. It is reached when each member of an oligopoly assesses competitors' behaviour and reacts with recognition of interdependence. Gal (2003), pp. 155, 164-165.

[271] Europe Economics (2001), p. 49; OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 22.

The price increases are sustainable because deviation by a firm would likely trigger retaliatory price decreases. Coordinated effects arise from the anticipation of coordinated actions and reactions. The main example of coordinated effects is the elevation of prices charged by the merging parties, along with those charged by the non-parties, where the merger enables tacit collusion to become stable.[272]

Coordinated effects are so called because even though firms may be acting independently from each other, as in the case of tacit collusion, they reach a "coordinated" outcome.[273] Contrary to a single dominant position, in the situation of competition amongst a few firms, each one believes that the outcome of its decisions depends significantly on the decisions taken by one or more of the other identifiable suppliers. Each firm therefore faces a residual demand curve and will set the price and output on the basis of its best prediction of the reactions of other firms, emphasizing particularly the reactions of the firms producing the closest substitutes.[274] Such individually optimising behaviour may in certain specific market situations lead to a collusive market outcome (tacit collusion) despite there being no communication or agreement between the firms.[275]

An economic definition of collusion concentrates on effects: collusion is oligopolistic behaviour leading to prices above the competitive level.[276] The definition includes explicit collusion in the forms of agreements or concerted practices and tacit collusion, which can also be defined as conscious parallel behaviour. Collusion is thus possible without communication between the companies involved. A legal definition of collusion is limited usually to agreements and concerted practices.[277] In tacit collusion, non-cooperative behaviour in an oligopoly leads to the collusive outcome.[278] The concept of a

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[272] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 22; Willig (1991), pp. 292-293.

[273] Europe Economics (2001), p. 49; OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 22.

[274] Mehta (1999), p. 56.

[275] Mehta (1999), pp. 56-57.

[276] Peeperkorn (1999), pp. 25-26.

[277] Peeperkorn (1999), p. 26.

[278] Mehta (1999), pp. 52. It would be interesting to analyse how the equilibrium market outcome in terms of output, its quality, and average price attained under conditions of tacit collusion would compare with that attained under either single dominance or collective dominance where there is explicit collusion. See Mehta (1999), pp. 52-53.

collective dominant position refers to a situation where output is reduced and price increased through explicit or tacit collusion.[279]

According to the economic model of tacit collusion, the members of an oligopoly realise that they can achieve higher profits compared to a competitive situation if they set higher prices or produce lower quantities. However, as soon as one of them sets a lower price in a subsequent period it might be able to further increase its own profit at the expense of the other members of an oligopoly.[280]

Coordination may also be reached by explicit collusion, i.e. with the help of communication, agreements, etc. Here also, the objective is usually joint profit maximizing. Whether this objective is attained depends on the incentive to co-operate and cheat, as well as on opportunities for monitoring and enforcement which all vary with the characteristics of the firms, markets and products.[281] However, collusion must be distinguished from companies' reactions to each other's decisions, which is typical in an oligopolistic market structure. In the presence of only a few companies in the market, companies can easily monitor each other's behaviour and adjust their own behaviour in response to a competitor's move.

Non-coordinated effects relate to the possibility of the merging parties to raise prices without cooperation. This corresponds broadly to the legal concept of single dominance. It may well be that the best response of competitors would be to also increase their prices following the merger, but this would still be a non-cooperative or "unilateral" effect because it does not depend on cooperation with the remaining firms.[282] In economics, the absence of expected significant unilateral price increases or feasible tacit collusion means that there are no appreciable grounds for a prohibition.[283]

Coordination may take various forms, such as keeping prices above the competitive level or limiting production or the amount of new capacity brought to

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[279] Mehta (1999), p. 52. The concepts of joint dominance, oligopolistic dominance and collective dominance can be used interchangeably, Lexecon Competition Memo, The Airtours Case, 12 November 1999.

[280] The firms are thus trapped in a classic prisoners' dilemma, where all the parties involved achieve the second best result if they pursue a joint (high pricing) strategy, while each of them could separately improve their own result if they "cheated" on the others. See, e.g., Niels, (2001), p. 170; Bundeskartellamt (2001), p. 16.

[281] Mehta (1999), pp. 56-57.

[282] Lexecon Competition Memo. The Airtours Case. 12 November 1999. See also the collective letter by a group of academic economists, July 10, 2002, available at http://europa.eu.int/comm./competition/mergers/review/ comments. html.

[283] Lexecon Competition Memo, The Airtours Case, 12 November 1999.

the market.[284] Firms may also coordinate by dividing the market, for instance by geographic area or other customer characteristics, or by allocating winning contracts in the bidding markets.[285] Coordination on capacity is generally viewed as being more difficult than coordination on prices due to the time lags involved.[286] The changes in capacity may also be difficult to observe.[287]

Coordination by dividing the market will be easier if customers have simple characteristics that allow the coordinating firms to readily allocate them. Such characteristics may be based on geography, the customer type or the existence of customers who typically buy from one specific firm. Coordination may also be relatively easy if the supplier for each customer can be identified. In that case, coordination can take place in allocating customers to their suppliers.[288]

Collective dominance may not lead to the same reduction in output and increase in price that would occur under single dominance. An output level may be higher than under a single dominance, with accordingly smaller welfare losses for consumers and other producers, but nevertheless there are welfare losses compared to competitive output.[289] If the members of an oligopoly focus on dimensions other than price or output, such as quality, branding or product innovation, it is not evident that similar market outcomes would arise in each equilibria of dominance.[290] If the conditions are conducive to collusion, the welfare consequences can be more serious than in a monopoly. Such conditions consist, for example, when a limited number of firms, homogenous product, mature market, low innovation, and high barriers to entry, coincide.[291]

3.4.2 Non-coordinated Effects

Mergers in oligopolistic market may also result in non-coordinated effects, also termed unilateral effects. The concept refers to the ability of a single firm to

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[284] Lexecon Competition Memo, Collective Dominance and Capacity Coordination, 31 January 2002.

[285] EU Horizontal Merger Guidelines, para. 40.

[286] Lexecon Competition Memo, The Airtours Case, 12 November 1999.

[287] Dethmers (2005), p. 648.

[288] EU Horizontal Merger Guidelines, paras 45-46.

[289] Mehta (1999), p. 59.

[290] Mehta (1999), pp. 53, 56.

[291] Mehta, (1999), p. 58.

unilaterally increase prices without coordinating with competitors. [292] The concept thus covers single dominance as well as unilateral price increases in the oligopolistic market structure.

A merger may result in a situation where there are only a few firms in the market, but none of them would be in a dominant position, nor would collusion be likely. In such a situation, economic theory suggests that if there are no efficiency gains, the merging parties will unilaterally increase their prices, and the merger would be detrimental.[293] Therefore, a merger may lead to anti-competitive effects even if it does not result in single dominance or tacit collusion.[294] Unilateral effects may result even if the merged entity does not have the largest share of the market, or at least falls well short of the market share normally associated with single firm dominance.[295]

In oligopolistic markets, non-coordinated effects mean that the alleged significant price increase or output reduction post-merger does not stem from coordination between the members of an oligopoly, but from the elimination of substantial competitive constraints of one or more sellers. Competition concerns thus arise from the ability of seller(s) to unilaterally raise prices above the competitive level or to reduce output.[296]

An often-referred example of unilateral effects in oligopolistic markets is the case where the second and third largest company merge. In this hypothesis a merger does not result in the emergence of a new market leader.[297] At first sight it might show that a merger would be a catch-up merger allowing the merged entity to compete more viably with the market leader. However, competition concerns result from the elimination of competitive constraint that the merging parties represented to each other prior to the merger. Hence, competition concerns may

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[292] Both the Finnish Merger Guidelines and the EU Horizontal Merger Guidelines apply the term "non-coordinated effects" but state that they are also called "unilateral effects". See also FTC Guide to Antitrust Laws.

[293] Motta (2000), p. 202; OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 26.

[294] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 328.

[295] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 8.

[296] EU Horizontal Merger Guidelines, para. 24; OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 313.

[297] See, for example, the comments derived from the Green Papers and the Collective letter by a group of economists, 10 July 2002, available at http//europea.eu.int/comm./competition/mergers/review/comments.html.

arise despite the presence of an incumbent market leader with alleged market power.

Unilateral effects are changes in the actions of the merging parties that would be profitable for them as a result of the merger if competitors did not alter their actions or reacted unilaterally themselves. A unilateral effect would arise when a merger between firms with close substitutes impels them to raise prices profitably whether or not competitors in fact follow. In essence, unilateral effects are those that arise when all market participants undertake unilateral actions.[298]

In contrast to coordinated effects, unilateral effects have a more reliable theory, which is based on comparative static equilibrium analysis. One of the most significant differences between coordinated effects and unilateral effects is that with coordinated effects a merger changes the whole nature of equilibrium interaction, whereas with unilateral effects there is merely a change from one equilibrium to another, less competitive one. [299]

Unilateral effects can arise in a variety of different settings. In each setting, particular other factors describing the relevant market affect the likelihood that unilateral effects exist. The settings differ by the primary characteristics that distinguish firms and shape the nature of their competition. [300] Within the general group of unilateral effects, the following concerns are typically identified.

The combination of the merging parties' operations may create substantial market power, enabling them to unilaterally raise prices and to restrict output.[301] This refers to single dominance and one type of unilateral effects. [302] Such

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[298] Willig (1991), pp. 292-293; OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 22.

[299] In some cases, prices may go up while in others they may not, due to Cournot or Bertrand behaviour by member of an oligopoly. See OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 324.

[300] See also the US Horizontal Merger Guidelines, Section 2.2; OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 23.

[301] See Tirole (1988), pp. 65-67; Camesasca (1999), p. 14.

[302] In the Draft EU Horizontal Merger Guidelines, the Commission stated that merger might create or strengthen a paramount market position. The concept is familiar from the German ARC, where it refers to a special case of the dominant position. See Bundeskartellamt (2001), p. 14; OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 63. In the Draft Guidelines the said position referred to a position enabling a firm to increase prices without being constrained by other market participants. See the Draft Guidelines, para. 11. It should be noted that in the Guidelines the term was synonymous with 'a dominant

mergers are expected to harm competition through the merging parties cutting output post-merger by more than the sum total of any increase in output by their competitors.[303]

As stated previously, single dominance refers to the firm's ability to increase prices without being constrained in any sufficient way by the actions of its actual or potential competitors or customers.[304] This position refers to the degree of market power at which a firm sets, through its own output level, not only the equilibrium market price but also the output levels of other incumbents.[305] Single dominance usually results from a high market share. A company with a high market share may be able to relate its business to the businesses of smaller competitors or to force them to follow its strategic behaviour on the market. A company can thus receive monopoly power even before achieving a monopoly position. The ability to control the market decreases the likelihood that efficiency gains will be transferred. The first approximation of market power resulting from a high market share can either be strengthened or weakened by competitive advantages consisting of, for example, capacity, degree of vertical integration and economies of scale. Competitive advantages are sources of market power.[306]

A single dominant position exists if other firms cannot easily expand their output given the pricing above marginal cost. Also, important entry barriers must significantly impede potential entry as it would make the pricing above competitive level by the dominant firm unsustainable. In assessing potential entry, it should be taken into account that entry may involve costs and new capacity may be effectively used only after a certain time. Dominance exists when substantial market share, together with pricing above (marginal) costs is expected to be sustained over a period of time during which incumbents and

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position'. See also OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 8.

303 OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 8.

304 See, e.g. the Draft EU Horizontal Merger Guidelines paras 11 and 19. Some mergers would, if allowed to proceed, leave a firm in a market position which is not constrained by actual or potential competitors or customers. The Draft Guidelines, para. 19. A firm left in this position may also refer to a third party, i.e. a firm not a party to a merger, as in the Case IV/M.1383 - *Exxon/Mobil*.

305 Mehta (1999), p. 52.

306 Hautala (2002), p. 46; See Virtanen (1998), pp. 315-320 where dominant position has been studied from the structural viewpoint and from the viewpoint of competitive advantage associated with the dynamic market process, as well as from the viewpoint of strategic behaviour and systematic approach, and finally all these approaches have been combined as an eclectic point of view.

entrants cannot be expected to bid away the dominant firm's market share through lower pricing.[307]

In addition to the price increase, single dominance may result in other anti-competitive effects. A dominant firm may have incentive to reinforce its dominance by acquiring, merging or through joint venture expanding its activities in the same or neighbouring markets. A dominant firm may have buyer power in the input market. An acquisition of a major input supplier by a dominant firm would thus dissipate its already existing buyer power. However, dominance can only reinforced and lead to the raising of rivals' costs if the rivals cannot shift to another input supplier or turn to captive production.[308]

The clearest situation of competition concerns is a merger with significant horizontal overlaps. The greater the overlaps are the more likely these concerns are. The removal of an actual competitor directly affects the market structure (i.e. direct effects) and may result in a firm with a dominant market position. The competitive effect depends on the position of the lost competitor and the market structure. If the merger results in the creation or strengthening of a market leader with significant market power, concerns are clearly identifiable.

Mergers in oligopolistic markets can also result in competition concerns even if the market shares or additions to the market share do not suggest single firm dominance. [309] A merger may diminish the degree of competition in an oligopolistic market by eliminating competitive constraints on one or more sellers, which consequently would be able to increase their prices, thus resulting in unilateral effects. [310] The elimination of competition between the merging parties, depending on the size of the undertakings involved in the merger, may have significant impact on market conditions. [311] Unilateral effects enable a company, because of the change in market structure resulting from the elimination of a competitor, to increase prices unilaterally after a merger, even if the remaining companies were to seek to compete. [312] Other members of an oligopoly may also follow this price increase.[313] Here, the price increase does not result from the coordination, but occurs unilaterally.

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[307] Mehta (1999), pp. 54-55.
[308] Mehta (1999), p. 55-56.
[309] Bundeskartellamt (2001), p. 16.
[310] EU Horizontal Merger Guidelines, para. 24; OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 324.
[311] Jacquemin and Slade (1989), p. 415, at 453-459; Camesasca (1999), p. 14.
[312] Christensen and Rabassa (2001), p. 229; OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, pp. 61-62.
[313] See the Collective letter by a group of economists.

By acquiring a "maverick" and/or the closest competitor in the market, the merged entity has an incentive for a unilateral price increase on products in which the target firm's pricing has constrained the acquiring firm's pricing. The elimination of the "maverick" and/or closest competitor also improves the chances of coordinated pricing among the remaining competitors.[314]

3.5 Assumptions Provided by Economic Theories and Models

3.5.1 Market Structure

3.5.1.1 Market Shares and Level of Market Concentration

The merger assessment in oligopolistic markets has moved from a structure-based approach to a more behavioural, game-theoretic approach. Therefore, both structural and behavioural elements are examined in this study. The purpose is to examine the underlying elements in the development of merger assessment.

Collective dominance, also termed coordinated effects in this study, can be based on the following factors: solely by reference to the structure of the market; by reference to the fact that the firms knowingly act in order to exploit their position or to foreclose competitors; by reference to a certain structure of the market and parallel action by the firms, although not in explicit collusion; or by reference to the fact that the undertakings involved have a special relationship.[315] The traditional assumption was that the structure of the market was the most important factor in the analysis.[316] Therefore, merger control primarily concerned the control of market structure: the aim was to prevent the concentration of markets about to be formed. Even if merger control has moved from a structural approach to an effects-based analysis, structural analysis still has a role in competition policy.

One of the main assumptions of economics has been that market concentration increases market power with the effect of price increases.[317] This assumption

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[314] A dominant firm can acquire other incumbents on the market, but its position is reinforced only when it acquires a maverick, which as a rule would have a cost structure similar to or lower than its own at some output rate. Mehta (1999), p. 55.

[315] Whish and Sufrin (1993).

[316] Kuoppamäki (2003), p. 329; Scherer and Ross (1990), p. 7.

[317] Camesasca (1999), p. 15.

derives from the Structure-Conduct-Performance framework, i.e. the SCP framework.[318] However, a mere finding of a concentrated market does not necessarily warrant a finding that its structure is conducive to coordinated effects.[319] Still, transactions in medium to highly concentrated markets should be analysed with particular attention in order to assess whether they would result in collective dominance.[320]

3.5.1.2 Structure-Conduct-Performance Framework

The SCP framework is the main result of the so-called Harvard School[321] and it postulates that there is a causal relationship between market structure, conduct and economic performance.[322] The ultimate focus of competition policy is performance. Ideally, good economic performance should flow automatically from the proper market structure and the conduct to which it gives rise.[323] Hence, according to the traditional framework, a chain of causation runs from the market structure to conduct and performance, as shown in the following figure:

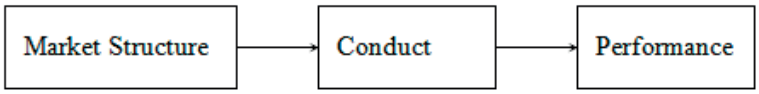

Figure 1. Traditional SCP framework[324]

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[318] In comparison, (neoclassical) price theory examines the interaction between prices and quantities. The assumptions derive from the conduct of firms, i.e. pricing.

[319] Guidelines for Electric Communications, para. 100.

[320] Mehta (1999), p. 58.

[321] Studies were performed for several sectors to collect market structure data like concentration ratios and height of entry barriers. These data were linked to performance indicators such as profits, the general conclusion being that concentrated markets with entry barriers showed above average profitability, see Peeperkorn (1999), p. 6.

[322] The SCP approach is based upon neoclassical theory. See Ferguson and Ferguson (1994), p. 16; Burton (1994), p. 9; Martin (1993), p. 5.

[323] However, Baumol (1982) in introducing the concept of contestable markets argues that particular market structure does not necessarily equate with particular type of performance. He suggests that regardless of the structure that emerges, contestability automatically ensures that good performance will result. According to his view, markets are contestable where the costs facing new entrants are similar to [incumbents] and where a firm leaving the market is able to salvage its capital costs, minus depreciation. This means that there are no sunk costs on the market. And because there are no barriers to entry or exit, monopoly profit cannot exist. See Scherer and Ross (1990), p. 7.

[324] Ferguson and Ferguson (1994), p. 16.

Market structure is the basis of paramount importance in the above chain of causation[325] and refers to factors such as the number of suppliers in the market and therewith their market shares and the degree of market concentration,[326] production differentiation, barriers to entry,[327] degree of integration, and cost structures and transparency. [328] Conduct refers, for example, to decisions regarding pricing, marketing, R&D, and investments.[329] Compared to the market structure, behavioural characteristics are more difficult to identify. In some cases, however, the analysis of firms' conduct is decisive. Performance refers to the relationship between prices and costs and profitability. The question of whether firms are productively and allocatively efficient relates to performance.[330]

The SCP framework is based on the idea that concentrated market structure will have foreseeable negative effects on performance, and in order to avoid these effects a concentrated structure has to be prevented from forming. The SCP framework has been used as a theoretical justification for competition policy which is based on the control of market structure. The merger control provisions thus provide an effective vehicle for this type of control.[331]

The SCP framework is an attractive approach for other reasons as well. The chain of causation in the framework is straightforward. Structural characteristics of the market are also relatively easy to identify. In addition, the framework provides clear guidance for a policy-maker: performance can be improved by influencing the structure of the market. [332] The link between structure, conduct and performance turns on the models of perfect competition, monopoly, monopolistic competition and oligopoly. Concentrated market structure tends to produce anti-competitive conduct and poor performance.[333]

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[325] Peeperkorn (1999), p. 6.

[326] Jacquemin (1990), pp. 1, 5.

[327] Jacquemin (1990), pp. 1, 5; Peeperkorn (1999), p. 8.

[328] Jacquemin (1990), pp. 1,5. An important dimension of market structure is the presence or absence of viable competitors outside national borders; their ability to compete depends *inter alia* upon tariffs, import quotas, and other government policies affecting international trade. Scherer and Ross (1990), p. 7; Peeperkorn (1999), p. 8.

[329] Scherer and Ross (1990), pp. 4-5; Peeperkorn (1999), p. 8.

[330] Ferguson and Ferguson (1994), pp. 14-15; Scherer and Ross (1990), pp. 4-5.

[331] Provisions which regulate the abuse of the dominant position of the market are not effective in controlling structural change caused by a merger. They are only used to regulate market conduct stemming from a previously established market structure.

[332] Ferguson and Ferguson (1994), pp. 14-17.

[333] This was first formalized by Mason (1939). His detailed case study approach was modified by Bain (1951), who sought to draw more generalised conclusions from large

The analysis of market structure may give information about the likelihood of supra-competitive pricing in oligopolistic markets. In addition to the supply side-side concentration, other dimensions of the market structure such as the absolute number of sellers, the level of concentration on the buyer side, the homogeneity of the product and the history of collusion in the market can also affect the likelihood of coordination. In addition, other factors such as the entry conditions or economies of scale or even factors whose significance is unclear, in particular, previous trends towards concentration or a shift in the rank of the leading firms may indicate whether a highly concentrated market is likely to behave competitively. At the same time, efficiencies may also be taken into account in the merger assessment.[334] In oligopolistic markets, analysis of conduct is an essential component of the SCP framework. Otherwise, only limited conclusions can be drawn; certain types of market structure are more likely to suggest beneficial or adverse performance.[335]

The analysis of market structure can also lead to misleading inferences. In oligopolistic markets, a small number of equal-sized firms suggest that price, advertising and other behavioural aspects are likely to be decided collusively. This would produce a higher price and lower level of output compared with the perfectly competitive situation. The market structure itself does not, however, determine collusive behaviour. The members of an oligopoly may compete for an increased market share with the result that price is kept close to the perfectly competitive level, giving an acceptable level of economic performance.[336]

The SCP framework has affected merger control policy. In its early decisions, the Commission, for example, referred to the causal relationship between structure, conduct and performance. The Commission has stated, for example, that structural factors - the high level of concentration, the symmetry of market shares and the stagnant demand – directly aided anti-competitive parallel behaviour with the effect of significant price increases. The relationship between

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sample, cross-sectional studies. Bain demonstrated the role played by economic concentration and its relationship to performance, stating that a concentration ratio (CR 8 > 70) exists beyond which industry performance leads to monopoly profit and below which industry performance tends towards competition. See Dupré (1993), p. 15; Ferguson and Ferguson (1994), p. 16. Mason and Bain are representatives of the Harvard School. Peeperkorn (1999), p. 6.

334 Winkler and Hansen (1993), p. 790; Briones Alonso (1995), pp. 346-347.

335 Ferguson and Ferguson (1994), pp. 14-17.

336 Wincler and Hansen (1993), p. 791. In particular, in the area of oligopolies, a competitor with a smaller market share might constitute an important disturbing factor, and its removal as an independent supplier in the market might have significant consequences. This is particularly case when the target firm is a close competitor of the oligopolists. See Briones Alonso (1995) p. 338.

structure, conduct and performance was also recognised to work in reverse order.[337] The Commission has stated, for example, that price increases and enhanced profits promote entry, which in turn modifies behaviour and the market structure.[338]

Previously, the Commission examined the potential for future anti-competitive behaviour by assessing the effects of a merger on the market structure.[339] A change in the structure was assessed to create an incentive to coordinate pricing and gain supra-competitive profits.[340] For example, a reduction in the number of suppliers from three to two would make anti-competitive parallel behaviour easier and affect a collective maximization of profits because prices could be increased without fear of offsetting losses in volume. In a duopoly, firms would control and monitor each other's behaviour. Any aggressive competitive behaviour would have a direct and significant impact on the activity of the others.[341]

The original SCP framework was subject to widespread criticism, mainly from the representatives of the Chicago School.[342] The relationship between structure, conduct and performance was suggested to be more complex than originally envisaged and the SCP approach was considered to give a limited perspective on the operations of markets, providing thus a poor (and even misleading) basis for policy formulation.[343] The Chicago School also criticized the empirical studies on which the framework was based. The Chicago School showed - by using the same or improved data with different techniques or by using new data - that the relationship between concentration, entry barriers and monopoly profits was less stable or strong as argued, or, at times, did not even exist. However, the

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[337] See Case IV/M.315 - *Mannesmann/Vallourec/Ilva*.

[338] In Case IV/M.315 - *Mannesmann/Vallourec/Ilva* the Commission estimated that if this conduct, i.e. a significant increase in market prices, occurred, it would be an incentive to enter the market. This should affect the behaviour of the two market leaders. The possible entry as a cause of market conduct would also affect the structure of the market. Thus, the chain of reaction can also work in the opposite direction.

[339] This was confirmed in Case IV/M.623 - *Kimberly-Clark/Scott*.

[340] See, e.g. Case IV/M.603 - *Crown Cork & Seal/Carnaud Metalbox*. See also Levy (1996), p. 408.

[341] See Case IV/M.190 - *Nestlé/Perrier*.

[342] The Chicago School consisted of a group of scholars/economists like Stigler, Demsetz, and Brozen. See Peeperkorn (1999), p. 6.

[343] Ferguson and Ferguson (1994), p. 14. There are considerable differences among economists concerning the most effective regulatory approach to non-competitive behaviour measures.

theoretical attack of the Chicago School on the SCP paradigm was considered to be more important.[344]

According to the Chicago School, the causal link was not considered to exist between high concentration and high profits, but between the size of the firm and increased efficiency, followed by concentration and ultimately increased profits. Central to this reasoning is economies of scale and scope, as well as a general belief that competition forces some firms to become superior in terms of efficiency, with the effect that they grow quicker than other firms, which may even go out of business. This may lead to higher concentration, but it is desirable from a competition policy point of view as it leads to more efficient firms, even when it would also result in some monopoly profits. Monopoly profits were neither very likely nor durable if barriers to entry were not very high and could be overcome in time.[345] Hence, the Chicago School had a greater reliance on the self-healing forces of competition. High concentration is not necessarily detrimental and competition policy action should be called for only in particular circumstances. By questioning the relevance of the SCP framework, the framework was extended and refined.[346]

The main feature of the new industrial economics[347] is that it assumes that structure is not necessarily an exogenous determinant of conduct and performance[348] but that performance - and more particularly conduct - affects structure. Structure may also be strategically manipulated by the firm.[349] For example, mergers directly affect the number and size distribution of firms in the market, and innovation and advertising may raise entry barriers as well as predatory pricing could force competitors out of the market and increased prices and enhanced profits may attract entry, modifying the structure of the market.[350]

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344 Peeperkorn (1999), p. 6.

345 Peeperkorn (1999), p. 7.

346 Peeperkorn (1999), p. 7.

347 The notion of new industrial economics refers to the latest developments of industrial economics.

348 A series of empirical studies (Demsetz and Pelzman) argued that the direction of causation may also run in the opposite direction. Even in the late 1960s Galbraith argued that large corporations effectively had the power to control consumers and plan their market. Burton (1994), pp. 9-10, 12-13.

349 Burton (1994), pp. 9-10.

350 Ferguson and Ferguson (1994), pp. 17-18.

Feedback mechanism [351] has the effect that market structure variables are endogenous, that is, determined within the system of relationships. Some economists even see the influences running from structure to conduct, and performance being so weak and the feedback mechanism affecting the structure so strong that they doubt the predictive power of the SCP framework.[352] The result is an extended SCP framework.

According to the figure below, the structure affects conduct and performance, which in turn affect the structure:

[351] For instance, sellers' pricing policies may either encourage entry or drive firms out of the market, thereby transforming the dimensions of market structure. Scherer and Ross (1990), p. 6.

[352] Scherer and Ross (1990), p. 6. As regards competition policy choices, some economists consider that non-collusive interdependence should be regulated through behavioural measures, while others consider that such phenomena should only be regulated through structural control. Winkler and Hansen (1993), p. 791.

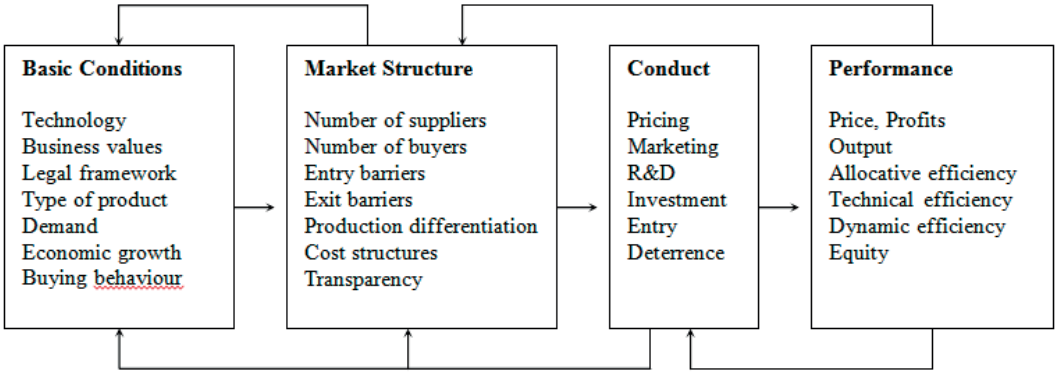

Figure 2. Extended SCP framework[353]

The extended framework in the above figure also provides basic conditions such as the legal framework, type of product, demand and economic growth[354] and takes into account that a number of structural factors, such as barriers to entry and transparency, can also be affected by firms' conduct.

As stated previously, according to the static approach of the SCP a certain structure is likely to be followed by certain behaviour in the market. In the static approach the direction of causal flow runs from structure to conduct and performance. Structural conditions form a source of monopoly power. Market structure is arguably the starting point for competition policy arguments. It is generally accepted that certain market conditions are a prerequisite for anti-competitive conduct and performance. However, conduct may play its own role.[355] An essential question is whether a policy can be designed that can function in these various circumstances.

There is a tendency to move from a structure-based approach to a more dynamic approach. According to the dynamic approach, structure may be concentrated but will be only temporary in innovative, quickly developing markets. Also, dominance that would be lost in the foreseeable future, for example, due to the

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[353] Peeperkorn (1999), p. 8. See also Oinonen (2010), p. 41.

[354] In addition, basic supply conditions have been considered to consist, for example, of the raw materials, the technology, the level of unionisation, the product durability, the value/weight ratio and the business attitudes. The basic demand conditions have been considered to consist, for example, of price elasticity, possible substitutes, growth rate, cyclical or seasonal characters of demand, the purchase method and type of marketing. It has been recognised that a wide array of other basic conditions like consumer preferences and state of the technology influence the market structure. The basic conditions may also themselves change. Peeperkorn (1999), pp. 7-8. There is no general consensus about the factors which may form basic conditions, and different factors have been considered to form basic conditions by different authors.

[355] Peeperkorn (1999), p. 8.

new entry, would not cause competition concerns. In the dynamic approach, the direction of causal flow runs both ways, including conduct causing structural change. Market power results both from strategic behaviour and structural conditions.

The extended SCP framework is still important today in competition policy, not as the perfect explanatory framework but as a good way to organise one's thoughts.[356] The framework is also useful for organizing relevant theories and facts. Thus, it will provide both theme and counterpoint for the analysis that follows.[357]

A number of basic conditions and structural characteristics which are provided in figure 2 are also described in Article 2(1) of the Merger Regulation as factors which the Commission will take into account when assessing the effect of a merger on competition. In Finland, these factors were first described in the Government Bill for the Act on Competition Restrictions in 1997. They were repeated in the Government Bill for the Competition Act. In the EU Horizontal Merger Guidelines, market shares and market concentration are also used as safe harbours, i.e. situations in which anti-competitive behaviour or effects are highly unlikely. The finding of competition concerns usually requires that structural, behavioural, and performance aspects are taken into account.[358]

3.5.2 Market Behaviour

3.5.2.1 Strategic Behaviour and Incentives for Collusion

Economic models do not provide information for concrete policy questions: under which market conditions will firms in oligopolistic markets compete fiercely on the important parameters of competition, such as price, quantity, quality and innovation, and under which conditions will competition be replaced,

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[356] Peeperkorn 1999, p. 7.

[357] Scherer and Ross (1990), p. 6.

[358] This is especially true with regard to antitrust rules (currently Articles 101 and 102 TFEU), where it is not enough to show that the market structure enabled anti-competitive conduct, but where also the conduct itself and/or the negative effects that with high likelihood resulted from this conduct have to be shown. It was argued previously that under the Merger Regulation solely a structural analysis may suffice. Peeperkorn (1999), p. 8.

on one or all parameters, by collusive behaviour. Most models also concentrate only on a limited number of factors.[359]

Attention to the behaviour of firms is reflected in the new industrial economics. The centre of attention is the possible strategic behaviour of companies in oligopolistic markets. It tries to deduct, within the framework of sophisticated microeconomic models and with the help of game theory, the most likely company strategies and the likelihood of collusion. [360] Game theory also completes the SCP framework.[361] A combination of game theoretic analysis and the SCP framework results in a more explanatory theory which - when combined with a detailed market analysis and previous experiences - further helps to understand collusion.[362]

As regards strategic behaviour, firms arguably seek a certain degree of independence. The objective of a competitive strategy may be the creation of "protected positions" within the market in order to be sheltered from competition.[363] A firm may have tangible and intangible assets which enable it to serve a particular group of customers or product line either at lower costs or in ways which reduce substitutability [364] with competitors' supplies. This may involve investing, for example, in customer-specific relationships, brands, product innovations, distribution network and service network[365] and may form barriers to entry.

3.5.2.2 Game Theory and Oligopoly Analysis

Game theory provides information about the factors that affect the likelihood of coordination. Such factors consist, for example, of the limited number of firms in

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[359] Peeperkorn (1999), p. 25.

[360] See Kantzenbach et al. (1995), Phlips (1995).

[361] Kuoppamäki (2003), p. 372.

[362] Kuoppamäki (2003), p. 373.

[363] The Commission has discussed this type of "protected position", for example, in Case IV/M. 477 - *Mercedes-Benz/Kässbohrer*.

[364] It should be noted that the concept of substitutability is not same as the concept of product differentiation. Substitutability means that consumers consider different products to be substitutes for each other, e.g. consumers may consider different juices to be substitutes for each other. The degree of substitutability can be measured by the cross elasticity of prices. Product differentiation means that same product could be sold to different type of customers for different prices, e.g. towels for industrial and for domestic uses.

[365] Williamson (1994), p. 142.

the market, costs similarity of firms, product homogeneity and the frequency of members of an oligopoly meeting each other in the market.

Coordinated effects are primarily based on non-cooperative game theory.[366] Game theory provides information about firms' behaviour in oligopolistic markets and explains the reasons for the behaviour. It models and analyses situations where the behaviour of one player is reflected by the assumption of other players' behaviour. The underlying assumption is that each player behaves rationally and maximises its profit.[367]

The main idea behind non-cooperative games, as opposed to co-operative games, is that the players cannot make binding agreements.[368] In non-cooperative game theory, fully rational oligopolistic behaviour requires an assessment of the potential actions of competitors, i.e. the interdependency of strategies.[369] Equilibrium only exists when the decisions lead to a 'self-reinforcing set of strategies in which each strategy is a best response to the other strategies'.[370] In other words, the game finds a stable outcome once every member of the oligopoly stays with its current strategy; for example, concerning the price of its own product, in the light of the strategies chosen by the other members of an oligopoly.[371]

Within the non-cooperative game setting the game which provides most insight into the difficulties and possibilities of collusion is the prisoner's dilemma game. Game theory shows the basic instability of collusion. A collusive outcome creates the possibility to free ride or cheat on the co-operative behaviour of others. The prisoner's dilemma analysis can be extended to the study of oligopolistic

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366 Amelio et al. (2009), p. 94. Game theory as a formal theoretical analysis started with the book of the mathematician John von Neumann and the economist Oskar Morgerstern (1944), Theory of Games and Economic Behaviour, Princeton University Press, Princeton. Peeperkorn (1999), p. 26.

367 Kuoppamäki (2003), p. 367. Game theory has also defined to include mathematically complex models for the analysis of strategic decisions made by several parties. Haupt (2002), p. 435. It has also been stated to use formal models to predict outcomes where there is interdependence between different parties. Decker (2009), p. 43.

368 A non-cooperative game setting thus seems to be the appropriate framework to apply, as anti-competitive agreements are unenforceable in court. Peeperkorn (1999), p. 26.

369 Peeperkorn (1999), p. 26.

370 This is called Nash equilibrium. A 'set of actions is in Nash equilibrium if, given the actions of its rivals, a firm cannot increase its own profit by choosing an action other than its equilibrium action'. Peeperkorn (1999), p. 26.

371 Peeperkorn (1999), p. 26.

behaviour of firms when the basic decisions of the members of an oligopoly are to compete or to collude, i.e. to defect or to co-operate.[372]

		Player B	
		Co-operate	Defect
Player A	Co-operate	3, 3	1, 4
	Defect	4, 1	2, 2

Figure 3. Prisoner's dilemma applied to a duopoly.[373]

In the above figure the dominant strategy for both firms is to defect. For player A it is advantageous to defect because 4>3 and 2>1 as well for player B because 4>3 and 2>1.

When a firm restricts output to ensure a high market price, it is advantageous for other firms not to cooperate. Similarly, when a firm will not restrict output it is against one's own interest to cooperate. As a result, firms will not cooperate and will forgo the collective optimal outcome and end up with equilibrium with lower collective profit.[374]

If oligopolistic markets always followed the rules of the prisoner's dilemma game and the dominant strategy was to defeat, competition concerns would be minimized. However, a number of cases show that a collusive outcome is attainable and that the dominant or chosen strategy is cooperation. When a number of factors exist, such as the limited number of firms in the market, the frequency of members of an oligopoly meeting each other in the market and the firms acting as if they were in a cooperative game setting, then a collusive outcome is more likely.[375] A limited number of firms may lead to a situation where the game is a non-cooperative game without the prisoner's dilemma.[376]

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[372] Peeperkorn (1999), pp. 26, 28.

[373] Peeperkorn (1999), p. 27.

[374] The latter is the Nash equilibrium of the prisoner's dilemma game. Peeperkorn (1999), p. 28.

[375] Peeperkorn (1999), p. 28.

[376] Peeperkorn (1999), pp. 28, 32.

The dominant strategy is then cooperation and a collusive outcome will become more likely. There are no specific thresholds for the number of firms which would suggest co-operation.[377] Coordination depends, for example, on cost similarity and product homogeneity.[378]

However, incentives for collusion are quite strong when there are up to five major firms in the market.[379] As the number of firms increases, the difficulty of coordination increases[380] as the number of communication channels increases.[381] When the number of firms increases beyond five, the short run gains from undercutting the collusive price increase quite rapidly, making collusion less stable.[382] Above a certain number of firms, possibly more than ten or 12, the likelihood of collusion is rather small.[383]

If a firm reduces its price, it may lose more in profits on its current sales than it could gain in profits from newly attracted sales. In this setting, cooperation is the dominant strategy for both players, and a collusive outcome ensues.[384]

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[377] Peeperkorn (1999), p. 32. Thresholds are not provided by economic literature either. See Peeperkorn (1999), p. 33.

[378] Peeperkorn (1999), p. 32.

[379] Mehta (1999), p. 58. The US Horizontal Merger Guidelines of 1992 presumed that a merger is 'likely to create or enhance market power or facilitate its exercise' when the HHI is above 1800 and the increase of HHI exceeds 100. The HHI of 1800 implies there are roughly five or six equally large firms in a market. Peeperkorn (1999), pp. 32-33.

[380] Scherer and Ross (1990), p. 278; Peeperkorn (1999), p. 33.

[381] Scherer and Ross (1990), p. 278.

[382] Unless the price elasticity of demand facing each participants is extremely low. Mehta (1999), p. 58.

[383] Peeperkorn (1999), p. 33.

[384] Peeperkorn (1999), p. 28.

		Player B: Co-operate	Player B: Defect
Player A	Co-operate	4, 4	3, 2
	Defect	2, 3	1, 1

Figure 4. Non-cooperative game with co-operation as the dominant strategy.[385]

In the above figure it can be seen that for player A it is advantageous to cooperate because 4>2 and 3>1 as well as for player B because 4>2 and 3>1.

A collusive outcome can be more likely due to the fact that the members of an oligopoly usually meet each other many times in the market, i.e. the game is played more than once. Although the prisoner's dilemma pay-off structure indicates that it is rational to cheat if one only looks at one round, such cheating may spoil future profits that could possibly be attained by collusion. Past behaviour and possible future profits become important when formulating a strategy. A distinction is usually made between games played an infinite number of times and those played a finite number of times.[386]

In a prisoner's dilemma setting played an infinite number of times the players might come to a collusive outcome.[387] Whether a collusive outcome results depends on the balance for each player of the gains from cheating in the first period against the loss of a part of monopoly profit for every period or at least a number of periods thereafter. The incentive to cheat or free ride will be weighed against possible punishment in the future. The punishment depends on the possibilities and rationality of punishing deviators. Free riding may be reduced by limiting the time or scope of free riding and/or increasing the possibilities of punishment. The punishment strategy that is chosen by the players' influences the pay-off that results after the cheating has been found out. The question of the

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[385] Peeperkorn (1999), p. 28.

[386] Peeperkorn (1999), p. 29.

[387] An infinitely repeated single-period game is called a super game. Peeperkorn (1999), p. 29.

best punishment strategy seems still to be unresolved. The players may use the exchange of sensitive market information to help to detect free riding.[388]

A collusive outcome may result also when the game is played a limited number of times in a non-cooperative game setting with a prisoner's dilemma pay off matrix. In theory, the collusion becomes, however, more difficult. This is explained by backward induction. In a one-period prisoner's dilemma type non-cooperative game the best strategy for each player is not to co-operate. This means that in a multi-period game it is rational for both players not to co-operate in the last period. Given the certainty that both will not co-operate in the last period it is not rational to co-operate in the penultimate period, as there can be no reward in terms of co-operation in the last period.[389] However, when the players do not have full information and they have to decide their best strategy in uncertainty, collusion again becomes a possible outcome. As a result of the players' inadequate information of the number of times the game will be played, the costs and possibilities of the punishment and the possible strategies of the others, it may be rational to cooperate, at least up to the point that someone starts to compete.[390]

Different strategies can be imagined in repeated games. A most successful strategy in simulation is to co-operate in the first round and thereafter do whatever the other player did in the previous round. This strategy has the advantage of starting with a co-operative strategy in the first round to try to reap the gains of collusion. It provides a quick reaction by hitting back when cheating is detected. After such punishment it offers the other possibility to restore the collusive equilibrium.[391] As regards cartels, the approach is that if someone deviates, the cartel will cease to exist. However, in coordinated effects, the members of an oligopoly will return to collusive behaviour after the punishment. The purpose of punishment is thus to return to coordination.

In addition, a collusive outcome is more likely if firms in a setting of a non-cooperative game such as the prisoner's dilemma, behave more as if they are in a cooperative game setting. Their perspective becomes less 'self-regarding' and more 'other regarding'. Communication may be essential to 'prevent' companies from starting to behave rationally as the underlying non-cooperative game assumes.[392]

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[388] Peeperkorn (1999), p. 29.
[389] Peeperkorn (1999), pp. 29-30.
[390] Peeperkorn (1999), p. 30.
[391] Peeperkorn (1999), p. 30.
[392] Peeperkorn (1999), p. 30.

In reality, oligopoly situations are more complicated. An oligopoly may have more than two players who decide on a number of parameters such as price, output, promotion activity, product differentiation, and product and process innovation. In addition, on each parameter there are usually a range of options and pay-offs. There is no super oligopoly model that by incorporating all parameters and strategies would help to understand the inherent tension between competition and collusion within oligopolistic markets. [393]

Game theory provides a tool to understand why collusion in general becomes more difficult when the following factors increase: the number of firms in the market, product heterogeneity, inequality between firms concerning demand and costs, uncertainty about demand and costs, the rate of technological development and the threat of entry. Collusion becomes more difficult for three reasons. Firstly, as the number of firms increases each firm's market share diminishes and therewith the interest to stay within a collusive arrangement. Secondly, differences between firms and their product increase the divergence of interests between firms. Thirdly, more information is required in order to monitor each other's behaviour. In other words, the incentive for free riding increases, while the possibilities to detect and punish free riding diminishes.[394] When the number of firms increases, or factors making the collusion more difficult increases, the situation changes into a non-cooperative game with prisoner's dilemma characteristics, where each company has the incentive to free ride. Whether a collusive outcome will actually result depends on the trade-off between this incentive to free-ride and the possibility to be detected and punished.[395]

The members of an oligopoly may take steps to undermine the gain from cheating, to make the pay-off structure change from a prisoner's dilemma to a setting where collusion is the dominant strategy.[396] Game theory also clarifies the role of so-called facilitating devices, also termed facilitating practices[397], which

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[393] Peeperkorn (1999), pp. 31-32.

[394] Peeperkorn (1999), p. 31.

[395] Peeperkorn (1999), p. 33.

[396] The plan guarantees customers any possible discount the company will give within, for example, the next one year. The lower price offered to lure new customers away from its competitors will have to be awarded to all its customers of the past year. Peeperkorn (1999), pp. 28-29.

[397] Facilitating practices have been defined as conduct which does not constitute an explicit ("hardcore" cartel) agreement and helps competitors to eliminate strategic uncertainty and coordinate their conduct more effectively. OECD Roundtable on Facilitating Practices in Oligopolies, DAF/COMP(2008)24, p. 9. Facilitating practices have also referred as strategies that reduce competitive friction and increase likelihood of coordinated conduct. Their often relate to information exchange or

facilitate cooperation between the members of an oligopoly. These may consist, for example, of the exchange of information, trade associations, price leadership, collaborative research and cross-licensing of patents, most favoured customer clause and meeting competition clause in sales contracts, resale price maintenance, basing point pricing and common costing books. Facilitating devices may also consist of price or capacity signalling.[398]

Facilitating practices mainly relate to the exchange of information between the members of an oligopoly. The exchange of information contributes to price transparency and therefore tends to lessen competition.[399] Information can be exchanged directly between competitors or through an intermediary like a trade organisation [400] or through customers. [401] Facilitating devices may limit the influence of factors that destabilise cooperative outcomes or strengthen those that support cooperative outcomes. This is done by limiting the gains of free riding, by monitoring each other's behaviour, thus making detection of free riding easier, by making the punishment better targeted or by making it easier to reach a consensus by reducing product heterogeneity, uncertainty about future cost, demand or capacity and technological change. [402] Monitoring is a precondition for a rapid reaction with the effect that punishment becomes more effective, thus reducing the incentive to free ride.[403]

As regards competition policy, the competition authorities have been advised to concentrate in oligopolistic markets on the detection of explicit collusion and on the detection and analysis of facilitating devices. Analysis of facilitating devices offers the possibility to examine conscious parallelism as closely as possible and

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responses to price cutting. Gal (2003), pp. 166-167. In terms of US antitrust practice, facilitating practices have been argued to form a required addition, the "plus" to conscious parallelism. Peeperkorn (1999), p. 33.

398 For the definition and examples of facilitating practices, see OECD Roundtable on Unilateral Disclosure of Information with Anticompetitive Effects, DAF/COMP(2012)17, pp. 30. See also OECD Roundtable on Facilitating Practices in Oligopolies, DAF/COMP(2008)24, p. 9; Peeperkorn (1999), p. 28-29, 31-32; OECD Roundtable on Oligopoly, DAFFE/CLP (99)25, p. 100; Leivo et al. (2012), pp. 244-246; Mehta (1999), p. 58; Rees (1993), pp. 27, 35, 37; Gal (2003), p. 167.

399 Temple Lang (2002), p. 3.

400 For example, as the collection and dissemination of data, forecasting studies, common costing books, etc. Peeperkorn (1999), p. 32.

401 For example, price leadership, most favourite customer clause and meeting competition clause, resale price maintenance, basic point pricing. Peeperkorn (1999), p. 32.

402 Peeperkorn (1999), p. 32.

403 Peeperkorn (1999), p. 36.

take remedial action where possible.[404] Competition policy is also best advised to try to prevent a game theoretical situation from arising of a non-cooperative game without prisoner's dilemma that would result from a limited number of firms as it has limited means to take effective action to redress such a situation.[405]

3.6 Conditions Conducive to Coordination

3.6.1 Indicators of Coordination

When assessing whether markets are conducive to collective dominance or coordinated effects *ex ante*, the analysis concentrates on whether the characteristics of the market are conducive to tacit coordination and whether coordination is sustainable. This approach is suggested by economic literature, the EU Horizontal Merger Guidelines and the Union Courts[406] and it is applied in Commission decision practice.[407]

Whether the objective of collusion - i.e. usually joint profit maximization - is attained depends on the incentive to co-operate and deviate, as well as the opportunities for monitoring and enforcement (i.e. retaliation) which all vary with market characteristics such as the number of firms in the market, product homogeneity, maturity of market, existence of a price leader, innovation and entry.[408] As regards sustainability, the analysis concentrates on whether the

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[404] Peeperkorn (1999), p. 33.

[405] Peeperkorn (1999), pp. 31-32.

[406] Amelio et al. (2009), p. 94.

[407] See, e.g. Case IV/M.190 - *Nestlé/Perrier*, Case IV/M.619 - *Gencor/Lonrho*, Case IV/M. 1383 - *Exxon/Mobil*, Case IV/M. 1524 - *Airtours/First Choice*, Case COMP/M. 2499 - *Norske Skog/Parenco/Walsum* and Case T-342/99 – *Airtours v Commission*. Guidelines for Electric Communications, para. 96.

[408] Joint profit maximization is argued to be more sustainable in a growing rather than a stagnant market: the absence of excess capacity is an element limiting the tendency to alter the basis of allocation of customers. The converse argument may be relevant in an industry of high sunk costs relative to variable costs where stagnant demand creates conditions for collusive behaviour as a means of minimizing joint losses. The existence of a dominant firm acting as a price leader can be materially important in maintaining price discipline and in acting as a swing producer, should changes in demand conditions require it. Mehta (1999), p. 57. Sunk costs are those costs that have to be made to enter or be active in a market but that are lost when the market is exited. Peeperkorn (1999), p. 18; EU Horizontal Merger Guidelines, para. 30, footnote 41. Sunk costs cannot be recovered through the redeployment of these assets outside the relevant market, i.e. costs uniquely incurred to supply the relevant product and geographic market. They may consist of market-specific investments in

member of an oligopoly has the ability and incentive to deviate from the coordinated outcome, taking into account the ability and incentives of the non-deviators to retaliate, as well as whether buyers, fringe competitors or potential entrants have the ability and incentive to jeopardize a coordinated outcome.[409] The key question in assessing mergers in oligopolistic markets is under what conditions collusive conduct becomes likely.

Dominance tends to lead to a high degree of market power, where the firm or firms concerned account for a high share of the market output, are able to set the level of market prices and hence also the supply responses of the remaining competitors, and are also able to limit entry.[410] Sometimes the indicators of collective dominance, for example, the product homogeneity and market transparency, are interrelated in such a way that it is difficult to make a distinction between cause and effect.

3.6.2 Characteristics of the Market

There is no rigid list of factors that will allow a high degree of certainty in making predictions on whether firms will be able to coordinate and hence raise price post-merger.[411] Economic theory suggests that coordination is more likely to occur in certain types of market configurations.[412] Market characteristics which are relevant in the assessment of the likelihood of coordination consist, for example, of high market concentration, product homogeneity, market transparency, stable market conditions and stagnant and inelastic demand, low level of technical change (including innovation), high barriers to entry, multi-market contacts, symmetry in market shares, capacities, and in cost structures as well as structural or contractual links between the members of an oligopoly.[413] Other factors which are relevant in the assessment of the likelihood of

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production facilities, technologies, marketing (including product acceptance), R&D, regulatory approvals, and testing. See the 1992 US Horizontal Merger Guidelines, Section 1.32.

409 Guidelines for Electric Communications, para. 96.

410 Mehta (1999), p. 60.

411 OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 324.

412 Drauz (2000), p. 2.

413 Drauz (2000), p. 2; Temple Lang (2002), pp. 1-3; Mehta (1999), p. 59; Amelio et al. (2009), p. 94; Peeperkorn (1999), p. 37. A number of these factors largely correspond to those market conditions which facilitate the creation and maintenance of explicit cartel agreements. See Bundeskartellamt (2001), p. 16. As regards the symmetry of market shares, it has been stated that similar technology, absence of the economics of scale or scope, and the commodity nature of products all combine to ensure that there is no great variability of market shares in such conditions. See Mehta (1999), p. 54.

coordination may consist, for example, of the need for an extensive distribution and service network, the importance of brand loyalty, the effects of information exchange[414] and absence of significant imports. Under these conditions members of an oligopoly are able to take into account in their own decision-making the likely reactions of competitors. All elements, however, have to be analyzed and interpreted according to the specifics of the markets involved.[415]

A horizontal merger can increase market concentration and thus increase the likelihood of collusion, by increasing the potential of firms to find it easier to collude.[416] In the market for homogenous product the tendency to joint profit maximization is greater. Each firm is engaged in close rivalry for customers and have greater difficulty in obtaining a lasting advantage by unilateral action. Product homogeneity and a low rate of innovation tend to make monitoring and punishment easier as well as contributing to price transparency. In the market for differentiated products, on the contrary, monitoring is more difficult and would give rise to opportunistic behaviour, i.e. to deviate from coordination.[417]

Product homogeneity makes markets more transparent and enables competitors to analyze each other's pricing behaviour. This is especially true in the context of commodity products.[418] The concept of product homogeneity has also given rise to some controversy. It has been argued that very few products are completely homogenous. According to this approach, the question should be whether the product is differentiated.[419] In the bidding markets the products offered may appear to be highly differentiated but they will become homogenous in the course of the bidding process. This reminds of the necessity to analyse how the markets

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[414] Peeperkorn (1999), p. 37. In its decision practice, the Commission has taken into account factors that refer to a game theory, such as the emphasis on the context of a concerted market, hidden competition and uncertainty about competitors' actions, a shortened reaction lag, eliminating the advantage of a company that tries to undercut, making targeted punishment possible, the possible effect that a reduction of *intra-brand* competition may have on *inter-brand* competition. Peeperkorn (1999), p. 38.

[415] Drauz (2000), p. 2; Temple Lang (2002), pp. 1-3; Mehta (1999), p. 59; Bundeskartellamt (2001), p. 16.

[416] See FTC Guide to Antitrust Laws.

[417] Mehta (1999), pp. 57, 59.

[418] See, e.g. Case IV/M.619 - *Gencor/Lonrho*, Joined Cases C-68/94 and C-30/95 *France and Others v Commission* and Case IV/M.1383 - *Exxon/Mobil*; Drauz (2000), p 3.

[419] In Case IV/M.1016 - *Price Waterhouse/Coopers & Lybrand* and Case IV/M.1524 - *Airtours/First Choice* the markets were characterised by stagnant demand growth and a very low level of innovation. It was also argued that from the consumers point of view products were very similar. See Drauz (2000), p. 3.

actually are functioning. The analysis should be both historical and prospective.[420]

Market transparency refers, for example, to the existence of public lists or references, price negotiations in bidding processes and product homogeneity.[421] Stagnant demand and low price elasticity have been considered to be basic characteristics favouring coordinated effects,[422] whereas the opposite, i.e. a high price elasticity of demand and expected growth in demand are destabilizing factors and may disrupt oligopolistic behaviour.[423]

The nature and evolution of demand and the price elasticity of demand are ambivalent factors for the assessment of coordinated effects. Firstly, it can be important to examine whether the product is a final product or an intermediate input in a complex production process. If the firm faces a competitive intermediate customer sector, it may find it difficult to exploit its market power. Intermediate inputs may also be characterized by countervailing buyer power. Secondly, a market with stagnant demand would seem to suggest that the merger aims to eliminate a maverick producer or limit price competition. This requires, however, that the remaining competitors are not able to bid away market share, for example, by utilising their capacity better and by competing on price. Thirdly, firms that are able to set price would not be at their profit-maximizing output level if the demand is inelastic. They will find that it is profitable to increase price and reduce output, thus simultaneously increasing their total receipts and hence their profits. An inelastic market demand curve provides incentives for collective output costs, but it also provides an incentive for each individual member to defect from the output cut.[424]

Collective dominance is arguably more difficult to establish in markets which are characterized by technological developments, i.e. emerging markets or innovation markets.[425] In its assessment, the Commission also looks at whether new products have recently entered the market. Joint profit maximization can also be successful if barriers to entry are high or at least significant and if other firms attracted by the high profits are not able to easily and rapidly enter and

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[420] Drauz (2000), p. 3.

[421] Lowe (1995), p. 150.

[422] Commission XXIVth Report on Competition Policy (1994), p. 153

[423] When the market has not reached the stage of maturity and when growth perspectives are high. Commission XXIVth Report on Competition Policy (1994), p. 153.

[424] Mehta (1999), p. 59.

[425] In Case COMP/M.2016 - *France Telecom/Orange* the Commission, e.g. considered that markets were emerging and concluded that there was no collective dominance.

take a significant part of the market. Markets where coordination is possible are not contestable.[426]

While assessing the market positions of the members of an oligopoly the Commission has considered, for example, the symmetry of market shares and cost structures. The Commission has stated[427] that the symmetry between two suppliers would mean that any aggressive competitive action by one would have a direct and significant impact on the activity of the other and could harm the profitability of both. A reciprocal dependency would create a strong common interest and incentive to joint profit maximization.

Aside from the above-mentioned key market structural factors such as high market concentration, symmetric market shares, absence of extravagant excess capacity, and similar technology and cost functions, collective dominance is more likely if there is a pattern of links between the major incumbents to facilitate price transparency, monitoring and punishment. Important joint ventures in related markets, supply relations between firms, and collaborative product development are all possible indicators of a commitment mechanism that contributes to the durability of collective dominance.[428] Competition between the members of an oligopoly may be ineffective due to shareholding or contractual or other links. However, the links are not necessary for coordinated effects to exist. Competition may be ineffective also due to the characteristics of the market.[429]

In certain market structures, especially oligopolistic markets or concentrated markets, an estimation of the structural elements does not give enough information to establish a dominant position. In these markets behavioural elements can give further information about the threat of possible collusion. The elements usually considered are pricing patterns and exchange of information.

The exchange of information creates a degree of market transparency between the suppliers in a highly concentrated market, which is likely to destroy hidden competition between the suppliers in the market on account of the risk and ease of exposure of independent competitive action. In a highly concentrated market, 'hidden competition' is essentially that element of uncertainty and secrecy between the main suppliers regarding market conditions, without which none of

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[426] Mehta (1999), p. 57.
[427] See, e.g. Case IV/M.190 - *Nestlé/Perrier*.
[428] Mehta (1999), p. 59.
[429] Temple Lang (2002), p. 1.

them has the necessary scope of action to compete efficiently.[430] High market transparency takes the surprise effect out of a competitor's action, resulting in a shorter space of time for reactions and with the effect that temporary advantages are greatly reduced. This effect of neutralising and thus stabilising the market positions of the members of an oligopoly is likely to occur because of an absence of external competitive pressures.[431]

Uncertainty is a normal competitive risk bringing about stronger competition because reaction and reduction of prices cannot be limited to the absolute minimum degree necessary to defend an established position. Uncertainty would lead the firms to compete more strongly than if they knew exactly how much response was necessary to meet the competition. They would have to exceed a minimum response, for instance offering more favourable discounts on more of their stock or by offering discounts for more products and in more territories.[432] In addition, a precondition is that the members of an oligopoly do not compete to any significant extent with each other, i.e. internal competition, nor are faced with any significant outside competition, i.e. external competition.[433] When certain market conditions are met, oligopolistic interdependence may lead to situations where supra-competitive pricing exists without explicit collusion. Whether the markets are conducive to coordination, the nature of the oligopoly, including its structure and behaviour in the market concerned, have to be assessed.[434]

Despite the lack of a predictive oligopoly model, the market concentration can in general be considered as a starting point for the assessment.[435] A merger which increases the market concentration may strengthen the ability of the remaining firms to coordinate their pricing and output.[436] A tight oligopolistic market structure may weaken competition by making collusion between the members of an oligopoly more likely. Hence, causality exists between the number of firms and the possibility of collusive behaviour. From a certain degree of market concentration collusive behaviour becomes more likely. Two companies with a

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[430] Where there is a low degree of concentration, market transparency can increase competition in so far as consumers benefit from choices made in full knowledge of what is on offer. Peeperkorn (1999), p. 37.

[431] Peeperkorn (1999), p. 38.

[432] Peeperkorn (1999), p. 38.

[433] See Case IV/M.580- *ABB/Daimler-Benz*, paras 86-87, where the Commission states, among other things, that the intensity of competition inside the duopoly will also be affected by the intensity of competition outside it.

[434] Winckler and Hansen (1993), p. 790

[435] Peeperkorn (1999), p. 32

[436] Camesasca (1999), pp. 14-15; Jacquemin and Slade (1989), pp. 441-450.

combined share over 50% of the relevant markets, three companies with over 66%, or four companies with over 75% arguably form evidence of a collective dominant position.[437]

Concentration levels are only the trigger for the analysis and the Commission has also analysed market behaviour and market outputs with regard to the assessment of mergers in an already concentrated market. The effects of further concentration in the market may be predicted by examining how the market has behaved in the past, and how it is currently behaving.[438] However, past conduct serves as additional evidence in the structural assessment and it is not indispensable.

A collective dominant position can arise if there are only a few competitors in the market and a strong interdependence exists between them, so that strategic decisions are made taking into account the likely action of competitors.[439] The predominant test used for the assessment of collective dominance seems to be a structural market analysis which tries to anticipate the future conduct of the undertakings concerned. It is based on the assumption that under a certain market structure collusive parallel behaviour is so likely that the merger would result in competition concerns.

The smaller the number of suppliers in the market, the easier it is for them to agree and monitor each other's behaviour. The incentive to coordinate is more evident since each firm cannot individually gain more sales without retaliating. If, furthermore, production technologies are similar, giving rise to similar plant capacities, the incentive is then reinforced.[440]

The precondition is that the level of concentration and symmetry in market shares have to be sufficient to allow anti-competitive parallel behaviour to occur.[441] An examination of the potential for the creation of collective dominance is certainly indicated when the merger would lead to similar market shares of two or three firms dominating the scene in a concentrated market, or a merger would remove a significant, albeit small, competitor in such a market context,[442] usually termed a maverick.

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[437] Temple Lang (2002), p. 3.

[438] Cook and Kerse (1996), p. 135. Hence, the estimation of market concentration does not give any further information because the structure is already known and in itself has been assessed indicative of possible anti-competitive behaviour.

[439] Bundeskartellamt (2001), pp. 15- 16.

[440] Mehta (1999), p. 57.

[441] Winckler and Hansen (1993), p. 790.

[442] Mehta (1999), p. 58.

The symmetry of market shares combined with the fact that competitors do not have the capacity to practically serve the whole market is an essential indication that price competition between the major firms in the market is unlikely to be intense. The symmetry of market shares also tends to support the premise that the firms' product technology and cost economics do not substantially vary. If the remaining supply was fragmented among a number of small competitors, it would be important to rule out any capacity on their part to rapidly expand output.[443] In addition to the symmetry of market shares, it also important to assess other symmetries such as the symmetry in cost structures, the degree of vertical integration, capacity utilization, product ranges, firm size, economies of scale and scope as well as sunk costs.[444]

3.6.3 Sustainability of Coordination

In addition to whether the characteristics of the market are conducive to tacit coordination, the sustainably of coordination must be assessed. Whether coordinated effects actually result depends on the ability of the members of an oligopoly to detect deviations and effectively punish deviators.[445]

Economic analysis shows that the ability to "punish" firms which deviate from an implicit agreement is an essential requirement for tacit coordination to be sustainable.[446] Successful coordination also requires that the actions of non-coordinating firms and potential competitors as well as customers should not jeopardise the outcome expected from coordination. The assessment therefore takes into account the responses of third parties, the effects of entry and the countervailing buyer power.[447]

3.7 Economic Evidence in Oligopolistic Mergers

In the past years, the Commission has embraced a more economic-based analysis in merger control.[448] In academic economics literature, methods such as the estimation of the residual demand elasticity of the merged entity, are suggested to be used in assessing market power quantitatively. The main problem is that

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443 Mehta (1999), p. 58.
444 Temple Lang (2002), p. 1.
445 Bundeskartellamt (2001), p. 16.
446 Lexecon Competition Memo, The Airtours Case, 12 November 1999.
447 OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 312; Kokkoris (2005), p. 40.
448 Dethmers (2005), p. 641.

quantitative analyses normally require a large amount of data, and still in most cases they can only be expected to give a certain indication of whether a merger significantly increases market power.[449] Another problem is that the required data for the analysis may not always be available. An attempt to predict the likely effects of a merger on competition is materialised in merger simulation models.

The Finnish Merger Guidelines and the EU Horizontal Merger Guidelines provide only limited guidance on the use of economic evidence in the merger assessment. The existing guidance provided by the guidelines mainly refers to unilateral effects, not coordinated effects. The Finnish Merger Guidelines, for example, state that useful information regarding the closeness of the merging parties as competitors can derive from the estimations of cross-price elasticities or the diversion ratios between the products of merging parties. Examinations of the pre-merger margins of the products of the merging parties may also provide indications of the likelihood of profitable price increases. In addition, the Guidelines state that other sources of information and various econometric studies can also prove useful.[450] The EU Horizontal Merger Guidelines state that the closeness of merging parties as competitors may derive, for example, from the estimation of the cross-price elasticities of the products involved, or diversion ratios.[451] The Commission has also provided guidance for the submission of economic evidence.[452] The ICN has provided, among other things, a toolbox for quantitative evidence.[453]

In its decision practice, the Commission has increasingly used quantitative evidence when available and when it is sufficiently sound. However, in many cases the assessment of mergers is still based on a qualitative analysis or a mixture of quantitative and qualitative evidence.[454] In cases where quantitative evidence is used, it often supports the qualitative analysis. It should also be noted that the evidence on which the competition authorities builds its decision must be eligible in court.[455]

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[449] Christensen et al. (1999), p. 243.

[450] Finnish Merger Guidelines, p. 75.

[451] EU Horizontal Merger Guidelines, para. 29.

[452] Best practice on Submission of Economic Evidence and Data Collection in Cases concerning the Application of Articles 101 and 102 TFEU and Merger Cases, Staff Working Paper.

[453] ICN Investigative Techniques Handbook for Merger Review, June 2005, pp. 53-64.

[454] Christensen et al. (1999), p. 243.

[455] See, e.g. OECD (2008). Presenting Complex Economic Evidence to Judges, DAF/COMP(2008)31.

As regards coordinated effects there is no clear set of thresholds or economic analysis that can be applied. Hence, the analysis is deemed to be more qualitative and less precise.[456] Economic analysis is mainly based on structural elements of the market, such as the market concentration ratios. In the cases discussed in this study the evidence of coordinated effects is mainly based on the assumptions derived from the market concentration and game theory.

Economic analysis has been used in only few cases which concern coordinated effects. In the *ABF/GBI* case, economic analysis consisted of the analysis of transaction data and was applied as a supplement to the qualitative analysis. In this case there was no need for extensive econometric evidence.[457] In the *Sony/BMG* case, the quantitative analysis consisted of analysis of the monthly net average wholesale prices charged by five major music companies.[458]

Economic analysis is more often used in assessing unilateral effects and it is mainly used to measure the closeness of the products of the merging parties by the so-called UPP test ("upward pricing pressure test"). However, neither the Finnish Merger Guidelines nor the EU Horizontal Merger Guidelines explicitly refer to the UPP test. Nevertheless, despite the lack of explicit reference to the UPP test in the guidelines, the Commission has applied the UPP test in its decision practice. It could be argued that the test is applied more for screening potential cases for in-depth investigation than for demonstrating any tentative price increases as a result of a merger.

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[456] Dethmers (2005), p. 641.
[457] Amelio et al. (2009), p. 94.
[458] Luebking and Ohrlander (2009), p. 68.

4 ASSESSMENT TOOLS PROVIDED BY EU MERGER CONTROL

4.1 Merger Control in EU Competition Policy

This chapter discusses the development of merger assessment in oligopolistic markets in the EU and, therewith, the guidance that the EU provides for the enforcement of national competition law, in this case Finnish competition law. The focus is on the development of the assessment criteria for coordinated effects. The chapter will also briefly discuss remedies applied for coordinated effects.

The first Merger Regulation in the EU entered into force in 1990. In 2004, it was replaced by Council Regulation (EC) 139/2004 [459] . The current Merger Regulation resulted from the merger review initiated by the Commission by publishing the Green Paper on 11 December 2001[460]. The proposal for the recast Merger Regulation was first published on 11 December 2002[461]. In this proposal, the Commission preserved the dominance test established in the old Merger Regulation. On 27 November 2003, the Council, however, re-worded the substantive test into the SIEC test. The change was made to the final version of the recast Merger Regulation. The Merger Regulation was adopted by the Council on 20 January 2004 and it entered into force on 1 May 2004.[462]

The Merger Regulation applies to the concentration of firms. The concept of concentration is defined in Article 3(1) of the Merger Regulation as a transaction

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[459] OJ 2004 L 24/1. The proposal for review of the Merger Regulation was adopted by the Council on 27 November 2003. See 2547th Council Meeting – Competitiveness – (Internal market, Industry and Research), 15141/03 (Presse 337), 26-27 November 2003. See also "Commission welcomes agreement on new Merger Regulation." IP/03/1621, 27 November 2003. See, e.g. Verouden (2004), p. 1.

[460] See the Green Paper and comments.

[461] COM (2002) 711 final – 2002/0296 (CNS) (2003/C 20/06), OJ 2003 C 20/4.

[462] Commission Press Release, "Commission adopts comprehensive reform of EU merger control". IP/02/1856, 11 December 2002; Commission Press Release, "Commission welcomes agreement on new Merger Regulation." IP/03/1621, 27 November 2003. The Council thus fulfils the request made by European Council on 20-21 March 2003 of taking forward this reform before the 2004 Spring European Council. See 2547th Council Meeting – Competitiveness – (Internal market, Industry and Research). 15141/03 (Presse 337), 26-27 November 2003.

whereby two or more previously independent parties merge[463] or whereby control - direct or indirect - is acquired[464] over the whole or parts of another undertaking on lasting basis. The concepts "merger" and "acquisition" are often used interchangeably to describe a concentration.[465]

The investigative process consists of two phases. In the first phase the Commission will assess under Article 6 of the Merger Regulation whether the concentration falls within the scope of the Regulation and, if affirmative, whether the merger causes serious doubts as to its compatitiblity with the common market. In this phase the Commission either clears the merger as such or under certain conditions, or initiates proceedings for an in-depth investigation. During this second phase under Article 8 of the Merger Regulation the Commission either clears the merger as such or under certain conditions or prohibits the merger. Prohibition usually follows from the fact that remedies that would adequately address competition concerns were not available, often as a result of acceptable remedies not being proposed by the merging parties. The merger control procedure in Finland is similar to that of the EU in all other aspects

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[463] The concept of concentration within the meaning of Article 3(1) is further defined in the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentration between undertakings (hereinafter the Jurisdictional Notice). The Jurisdictional Notice provides the following elaboration on the concept of control in paras 9-10: "A merger … occurs when two or more independent entities amalgamate into a new undertaking and cease to exist as separate legal entities. A merger may also occur when an undertaking is absorbed by another, the latter retaining its legal identity, while the former ceases to exist as a legal entity. A merger … may also occur where, in the absence of a legal merger, the combining of the activities of previously independent undertakings results in the creation of the single economic unit." The concept of merger is wider than the legal "fusion". A prerequisite for the determination of a common economic unit is the existence of a permanent, single economic management. An absorption merger is a situation where a company merges into another company. All rights and liabilities of the company are thus transferred into the other company, resulting in the merged company not existing as an independent legal entity. In a combination merger two or more companies merge with each other, forming a new company. In a subsidiary company merger, a subsidiary company merges into a parent company. See Cook and Soames (1991), pp. 330. See also Recital 20 of the Merger Regulation.

[464] Christensen et al. (1999), pp. 207-208. Control may be acquired by one undertaking acting alone or by two or more undertakings acting jointly. Control may also be acquired by a person in circumstances where that person already controls – solely or jointly – at least one other undertakings or, alternatively, by a combination of persons (which controls another undertaking) and/or undertakings. A concentration is limited to changes of control. Concerning the concept of acquisition, there may also be acquisition of control even if it is not the declared intention of the parties.

[465] In some cases, the exact nature of the transaction may even be unclear. This is especially true in cases where holding companies are involved. The Commission has sometimes used the term "economic merger" in order to describe a situation where all assets of the parties of the transaction are transferred into a holding company in which both parties have joint control.

except that the FCCA cannot prohibit a merger. Instead, it must propose the Market Court to prohibit the merger.

4.2 Substantive Test for Merger Assessment

4.2.1 SIEC Test under Merger Regulation

The Commission assesses the compatibility of a merger concentration with the common market on the basis of its effect on the structure of competition in the EU.[466] According to Article 2(3) of the Merger Regulation, a merger is decleared incompatible with the common market if it would "*significantly impede effective competition in the common market or a substantial part of it, in particular, as a result of the creation or strengthening of a dominant position*". This operative test of compatibility elaborates what is measured in EU merger control.

The elements of the SIEC test are the same as those of the dominance test, but the order is reversed. The emphasis of the SIEC test is on significant impediment to competition. The creation or strengthening of a dominant position is a particular situation of the impediment. The wording '*significant impediment to effective competition*' covers all types of competitive concerns, including coordinated effects as well as unilateral effects in oligopolistic markets.

As regards the scope of the SIEC test, Recital 25 of the Merger Regulation states, among other things, that the significant impediment to effective competition should be interpreted as extending the scope of the test beyond the concept of a dominant position only to non-coordinated effects in the oligopolistic market structure.[467] This statement has caused some controversy and the relevance of its guidance has been questioned.[468] An oligopoly may not be a problem in itself. The focus is on whether or not a merger is likely to result in coordinated effects.[469]

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[466] Remedies Notice, para 4; Recital 6 of the Merger Regulation.

[467] The last sentence of Recital 25 of the Merger Regulation reads as the following: "The notion of 'significant impediment to effective competition' should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned." The wording thus suggests that in all other cases except in the context of oligopolistic market structure, a dominant market position should be constructed.

[468] See, e.g. González Díaz (2004), p. 189.

[469] Drauz (2000), p. 1.

The SIEC test can be applied to all types of mergers that significantly impede effective competition. As regards the dominance test there was a disagreement as to whether the test could be applied to mergers that do not create or strengthen a dominant position in oligopolistic markets.[470] The debate essentially concerned the degree to which the concept of collective dominance could be extended to cover unilateral effects.[471]

At the time of the adoption of the SIEC test in the EU, different views were expressed about the nature of the change brought about by the Council, e.g. whether the test was an SLC test, an altered version of the dominance test[472] or an "SLC-or-dominance" test[473]. The concept of the SIEC test[474] was, however, established soon after the adoption of the recast Merger Regulation.

4.2.2 Dominance Test under Old Merger Regulation

A number of cases discussed in this study concern the merger assessment under the dominance test. The elements and the scope of the test are therefore discussed below. According to Article 2(3) of the old Merger Regulation, a merger was declared incompatible with the common market if it "*creates or strengthens a dominant position* as *a result of which effective competition would be significantly impeded in the Common Market or in a substantial part of it*." Hence, the dominance test consists of two elements, i.e. the creation or strengthening of a dominant position and the impediment of effective competition.

In the early years of the old Merger Regulation there was a discussion at the EU level on the relationship between the elements of the test and, in particular, whether the substantive test was a single or a two-fold test. The same type of discussion did not take place in Finland at the time of the adoption of the merger control provisions. One of the potential reasons for the absence of discussion was that the discussion that took place in the EU was comprehensive and that the

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[470] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 8.

[471] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 8.

[472] See Kokkoris (2005), p. 44.

[473] See, e.g. Vickers (2004), p. 460. In the OECD Roundtable on Standards of Merger Review, DAF/COMP(2009)21, p. 7 the EU was considered to have a hybrid test which combines the dominance and SLC standards.

[474] See, e.g. Lowe (2003), p. 9. The concept of SIC test has also been applied in some contexts. See, e.g. Voigt and Schmidt (2004), pp. 584, 589-590.

conclusion of the discussion, i.e. that the test describes a qualified dominant position, could also be accepted in Finland. A qualified dominant position means that the creation or strengthening of a dominant position is not prohibited *per se* but requires a qualification of significant impediment to effective competition. When the elements of the test are discussed, it should be taken into account that there is a distinction between the test itself and the analysis which is based on it.

The wording of Article 2(3) of the old Merger Regulation did not explicitly state whether effective competition would be significantly impeded by more than one undertaking which together have the power to act to an appreciable extent independently of the remaining competitors, customers and consumers. At the time of the adoption of the old Merger Regulation there was a lively debate as to whether an increase in market concentration, and the threat of coordinated action, could be challenged under the dominance test.[475] The power of the Commission to assess collective dominance was one of the most controversial issues under the old Merger Regulation.[476] As regards the scope of the test, the conclusion was - with reference to the EC Treaty as a whole and the objectives of the Merger Regulation - that collective dominance was covered by the Merger Regulation.[477]

The Commission interpreted the old Merger Regulation so that the dominance covered both single and collective dominance. The Commission stated, *inter alia*, that effective competition may be significantly impeded as a result of the exercise of market power by either one firm behaving alone or more firms behaving jointly to an appreciable extent independently of other competitors and of consumers. This interpretation was based on the principle that Article 3(1)(g) of the EC Treaty and Article 2(3) of the Merger Regulation pursue the maintenance of effective competition.[478] Further guidance was provided by the Recitals of the old Merger Regulation. Recital 2 of the old Merger Regulation addressed the objective of the instituting a system ensuring that competition in the internal market is not distorted and referred to Article 3(1)(g) of the EC Treaty.[479] The

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[475] Pitofsky (2000), p. 4; OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 310.

[476] Ysewyn and Caffarra (1998), p. 486.

[477] This opinion was established, e.g. by Overbury (1993), p. 586.

[478] Commission XXIInd Competition Report, p. 138.

[479] Whish and Bailey (2012), p. 50. The first comity report was published in 1966. The EEC Treaty of 1957 did not include any provisions for the control of concentration, but Article 235 of the Treaty provided the Commission with the authority to establish any provisions necessary for the implementation of the single market.

Treaty of Lisbon[480], however, repealed Article 3(1)(g) and relocated it to Protocol 27 annexed to the TEU and the TFEU, stating that "the internal market as set out in Article 3 TEU includes a system ensuring that competition is not distorted". In addition, Article 3(1)(b) TFEU provides the EU with exclusive competence in establishing the competition rules necessary for the functioning of the internal market.[481]

Also Recital 7 of the old Merger Regulation addressed the option of the Commission to give itself the additional powers of action necessary for the attainment the objectives of the Treaty and referred to Article 83 and Article 308 of the EC Treaty. The TFEU does not contain specific provisions on merger control but the legal basis for the Merger Regulation is stated to be Article 103 and 353 TFEU[482]

As regards the scope of the old Merger Regulation, the conclusion was that mergers likely to reduce competition by facilitating anti-competitive cooperation, i.e. coordinated effects, could be prohibited under the dominance test. The definition of dominance hence also covered collective dominance.[483] If collective dominance had not been covered by the Merger Regulation, it would have created a loophole in the fundamental Treaty objective of maintaining effective competition and safeguarding the proper functioning of the common market.[484] The presumption was that the legislator did not intend to have a loophole in the fundamental EC Treaty objective in Article 3(1)(g).

The Commission acknowledged that anti-competitive effects in oligopolistic markets that did not result from coordination might not have been covered by

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[480] The Treaty of Lisbon amended the Treaty on European Union and the Treaty establishing the European Community, renaming the latter as the Treaty on the Functioning of the European Union. The Treaty of Lisbon is available at http://europa.eu/lisbon_treaty/full_text/index_en.htm.

[481] Whish and Bailey (2012), p. 50. Whish and Bailey state here that in the judgement of the Court of Justice in Case C-52/09 *Konkurrensverket v. TeliaSonera AB*, the Court refers to Article 3(3) TEU and Protocol 27 as there was no difference from Article 3(1)(g) of the EC Treaty.

[482] Whish and Bailey (2012), p. 828.

[483] See OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 8. If the dominance test were interpreted to include only single firm dominance, it would have caught significantly fewer anticompetitive mergers than the SLC test. The dominance test, however, includes single as well as collective dominance. See OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 20.

[484] Commission XXIInd Competition Report, p. 138.

the dominance test provided in the old Merger Regulation.[485] All mergers which allowed firms to unilaterally raise prices but did not create or reinforce a dominant position would not be subject to a prohibition decision.[486] There was thus an alleged gap in the scope of the dominance test

The proponents of the change of the substantive test proposed that the EU should adopt a so-called SLC test, which measures the "*substantial lessening of competition"* and which is applied, among others, in the US.[487] The scope of the SLC test was different from that of the dominance test and would have also had material effects in EU merger control. As regards coordinated effects, the SLC test would apply if the probability of coordination were proved. [488] The dominance test required that a collective dominant position is constructed.[489] In addition, it was assumed that an SLC-type of test could be used to prohibit all mergers leading to a material increase in price. The dominance test could not be applied unless "dominance" equated to the level of market power required to raise prices any material amount above competitive levels.[490] The Council finally did not change the dominance test into the SLC test but into the SIEC test.

Dominance has usually been defined as an ability to act independently of competitors, customers and ultimately consumers. It is sufficient that a firm has an appreciable influence on the conditions under which competition will develop in the market and has an ability to act largely in disregard of such competition.[491] The Court has stated that "an undertaking in a dominant position is not by definition exposed by any effective competition".[492] Dominant position does not

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[485] Monti (2003), European Competition Policy: Quo Vadis? SPEECH/03/195; OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 327.

[486] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 26.

[487] Hautala (2002), pp. 43-50.

[488] Hautala (2002), p. 47; OECD Journal of Competition Law and Policy (2001), p. 142.

[489] See, e.g. Case IV/M.190 - *Nestlé/Perrier*, Case IV/M. 619 - *Gencor/Lonrho*, Case IV/M.1524 - *Airtours/First Choice* and Case IV/M.308 - *Kali und Salz/MdK/Treuhand*. See also Case T-342/99 *Airtours v. Commission* and Case T-102/96 *Gencor v Commission*.

[490] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 28.

[491] Christensen et al. (1999), p. 241.

[492] See Case C-85/76 *Hoffmann-La Roche*; Downes and MacDougall (1994), p. 287. A company is dominating (i.e. *de facto* monopoly position), if it is not exposed to any competition or any substantial competition.

thus preclude some competition.[493] The question, however, is what degree of independence constitutes dominance.

As regards proceedings carried out by the Commission, the phase in which dominance has been established under the dominance test has varied. In some cases, dominance has been established after the analysis of market shares and competitive advantages and was set against competitive constraints identified.[494] In other cases, dominance has been established only after the assessment of the following factors: market shares, remaining competitors, countervailing buyer power and entry.[495] However, the phase in which dominance was established has not materially affected the outcome of the merger assessment.

4.3 Anti-competitive Effects in Oligopolistic Markets

4.3.1 Coordinated Effects

As stated in the previous sections, a merger in oligopolistic markets may result in coordinated effects and unilateral effects. This section concentrates on coordinated effects.

Firstly, market conditions themselves may indicate the likelihood of coordinated effects. For example, structural links among the members of an oligopoly are not required. Secondly, a parallel between a dominant position and a certain threshold level of market power is drawn as well as between market power and the power to profitably raise prices above competitive levels for a significant period of time, respectively. Thirdly, a parallel between the likelihood of

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[493] Case C-85/76 *Hoffman – LaRoche*. Christensen et al. (1999), p. 241. The Court has indeed suggested that dominance does not preclude "a very lively competitive struggle". Fine (1993), p. 704.

[494] For example, in Case IV/M.623 - *Kimberly-Clark/Scott* there was first an assessment of the market shares and the competitive strength of the brands of the new entity. This assessment led to the establishment of a dominant position. Then after this came an assessment of whether there was any power to restrain the behaviour of the new entity which had a dominant position. In this assessment the Commission evaluated retail buyer bargaining power and the threat of new entry.

[495] For example, in Case IV/M.603 - *Crown Cork & Seal/Carnaud Metalbox* the market shares, remaining competition, countervailing power of customers and barriers to entry were assessed first. After this assessment the Commission concluded that the operation would lead to the creation of a dominant position in the market for tinplate aerosol cans.

coordinated effects and the likelihood that prices will be set at or above the level charged by a single dominant firm.[496]

According to the EU Horizontal Merger Guidelines the structure in some markets may be such that firms consider it possible, economically rational, and hence preferable, to adopt on a sustainable basis a course of action on the market aimed at selling at increased prices. [497] Mergers in concentrated markets may significantly impede effective competition through the creation or strengthening of a collective dominant position, because it increases the likelihood that firms are able to coordinate their behaviour and raise prices, even without entering into an agreement or resorting to a concerted practice within the meaning of Article 101 TFEU.[498] This refers to the situation where firms were not coordinating before the merger.[499] A merger may also make coordination easier, more stable or more effective for firms that were already coordinating before the merger either by making the coordination more robust or by permitting firm to coordinate even higher prices.[500]

Mergers that are likely to reduce competition by facilitating anti-competitive cooperation, i.e. resulting in coordinated effects, would have probably been prohibited under either the dominance test or the SIEC test.[501]

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[496] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 27.

[497] EU Horizontal Merger Guidelines, para. 39; Draft EU Horizontal Merger Guidelines, para. 40. See also Dethmers (2005), p. 638.

[498] Case T-102/96 *Gencor v Commission*, para. 277; Case T-342/99 *Airtours v Commission*, para. 61; EU Horizontal Merger Guidelines, para. 39.

[499] EU Horizontal Merger Guidelines, para. 39. Prior to the publication of the EU Horizontal Merger Guidelines, the Commission's only guidance which dealt with collective dominance was the Commission Notice on the Application of Competition Rules to Access Agreements in the Telecommunications Sector, OJ 1998 C-265/2, paras 76-80, 129-130. See Temple Lang (2002), p. 6.

[500] EU Horizontal Merger Guidelines, para. 39.

[501] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 8. If the dominance test were interpreted to include only single firm dominance, it would have caught significantly fewer anti-competitive mergers than the SLC test. The dominance test, however, includes single as well as collective dominance. See OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 20. It should be noted that potential gaps in the scope of the dominance test were also identified with regard to collective dominance. See Monti (2003). Review of the EC Merger Regulation – Roadmap for the Reform Project. SPEECH/02/252

4.3.2 Non-coordinated Effects

Mergers in oligopolistic markets involving the elimination of important competitive constraints that the merging parties previously exerted upon each other, together with a reduction of competitive pressure on the remaining competitors may, even where there is little likelihood of coordination between the members of an oligopoly, also result in significant impediment to competition. Recital 25 of the Merger Regulation further states that all mergers giving rise to such non-coordinated effects shall also be declared incompatible with the common market.[502]

In evaluating unilateral effects in oligopolistic markets, the Commission will consider various factors. Firstly, a high concentration level could indicate lack of competitive pressure on the market. Secondly, the Commission will assess whether firms are distinguished primarily by differentiated products or by their capacities. In the latter case, products are undifferentiated, homogenous.[503] The Commission further assesses the effects of the strategic decisions companies make, i.e. decisions which concern output or capacity levels and price settings.[504]

In a differentiated product market, the degree of substitutability between the products determines the competitive constraint. Even if market shares are generally considered an imperfect indication of the intensity of competition in differentiated product market, they may also give information on the likely competitive pressure in the market.[505] Competition concerns may arise if the merged entity finds it profitable to raise prices as a result of the loss of competition between the merging parties. The merger may thus remove the particular constraint the merging parties have exercised on each other before the merger.[506] The incentive to increase prices is strongly related to the proportion of

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[502] See Recital 25 of the Merger Regulation; EU Horizontal Merger Guidelines, para. 25. As regards unilateral effects, see, e.g. Ivaldi, et al. (2003). See also Black (2003), pp. 408-411.

[503] Although most markets involve some elements of product differentiation, there exist markets in which products are relatively homogenous. Products are relatively homogenous if customers consider the products from one producer a sufficiently good substitute for the product from any other producer. See the EU Horizontal Merger Guidelines, para. 28.

[504] Some commentators criticized the division of competitive effects according to decision the companies make, i.e. between output or capacity levels and price setting, and emphasised the importance of the effects between differentiated and undifferentiated products.

[505] EU Horizontal Merger Guidelines, para. 28.

[506] One of the most strategic decisions of the members of an oligopoly relates to prices. Product differentiation provides flexibility with regard to setting prices. See also the EU Horizontal Merger Guidelines, para.24.

lost sales that the merging firm would be expected to recapture. The Commission will, firstly, focus on the degree of substitution between the merging parties' products. High degree of substitution suggests strong incentive to raise prices and likely post-merger price increase.[507] The degree of product differentiation is examined by the nature of the products of the merging parties and their competitors. The incentive to raise prices is more constrained when competitors produce close substitutes to the products of the merging parties.[508] The incentive of the merged entity to raise prices may also be influenced by the easiness and the costs for the merging parties or competitors to reposition their products or to extend their product portfolio. Large sunk costs can make this less likely.[509]

According to the Commission, output and capacity decisions may also determine prices in markets with differentiated products. An output reduction in one of the merging parties' products likely results in increased demand for competing producers. The incentive of the merging parties to reduce output will be stronger the stronger is the degree of substitutability between the merged entity's products. The reactions by competitors are affected, for example, by the capacity constraints and the degree of substitutability of products.[510] The Commission will also analyse the *ability* and the *incentive* of the merging parties to reduce output as well as entry barriers, buyer power or efficiencies.[511]

With regard to markets with undifferentiated, homogenous products, firms are primarily distinguished by their capacities. The Commission has stated that "in markets where products are relatively homogenous, i.e. undifferentiated, the merging parties may have an incentive to reduce output or capacity below the combined pre-merger levels, thereby raising the market prices". Before the merger, an increase in the price induced by the reduction of output by one of the merging firms would only benefit this particular firm through higher margins on its sales whereas after the merger, the higher margins would also be enjoyed by the other merging firm.[512]

The extent of the post-merger price increase will depend on the ability and incentive of the competitors to expand output. Post-merger price increase may be limited if the merged entity's customers find alternative sources of supply, i.e. competitors have enough capacity and it would be profitable for them to expand

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[507] EU Horizontal Merger Guidelines, para. 28.
[508] EU Horizontal Merger Guidelines, para. 28.
[509] EU Horizontal Merger Guidelines para. 30.
[510] EU Horizontal Merger Guidelines para. 28.
[511] EU Horizontal Merger Guidelines para. 36
[512] EU Horizontal Merger Guidelines, para. 28.

output. The competitors may, however, be unable or unwilling to expand output sufficiently to offset the output reduction. Similar to the wording of the US Horizontal Merger Guidelines, the Commission states that a non-party expansion, i.e. competitors' expansion, is unlikely if those firms face binding capacity constraints or if existing excess capacity is significantly more costly to operate than capacity currently in use.[513] However, the US Horizontal Merger Guidelines set a further requirement that capacity constraint faced by the competitors could not be economically relaxed within two years.[514]

The analysis of the effects of a merger on competition may be different in bidding markets.[515] In these markets, the main competitive outcome is ensured by the presence of several competitive bids. Here, the Commission will analyse whether the merging parties would likely be each other's most credible contenders in bidding contents. This could be the case when the merging parties are the two bidders with the lowest costs and where no other bidders have sufficiently low costs to exercise a competitive constraint against the winning bidder.[516]

4.3.3 Remedies Addressed to Anti-competitive Effects

The general purpose of remedies is to maintain or restore competition that would be eliminated as a result of a merger.[517] Remedies should also be designed in a way that does not cause competition concerns. Remedies are usually classified into two categories: structural and behavioural remedies However, the line between the two categories is not always clear. In some cases, a remedy may be of a "hybrid" nature, i.e. having elements of both categories. Also, a remedy package may consist of remedies presenting different categories.

Remedies are particularly difficult to design in cases which take place in oligopolistic markets and may result in coordinated effects.[518] A finding of coordinated effects will rest on the characteristics of the affected market and the

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[513] See Case COMP/M.1693 - *Alcoa/Reynolds*. See the EU Horizontal Merger Guidelines, para. 34. Compare to the US 1992 Horizontal Merger Guidelines, Section 2.22.

[514] See the US 1992 Horizontal Merger Guidelines, Section 2.22.

[515] In bidding market sellers compete to make a specific offer to each particular buyer. The EU Horizontal Merger Guidelines, para. 29.

[516] EU Horizontal Merger Guidelines, para. 29.

[517] Commission, Merger Remedies Study. Public version. DG COMP, European Commission, October 2005 available at http://ec.europa.eu/comm/competition/mergers/others/remedies_study.pdf. (hereinafter Merger Remedies Study), pp. 3, 22.

[518] Cook and Kerse (1996), p. 137.

behaviour of firms there.[519] The Remedies Notice provides guidance for the design of remedies but not specifically for the design of remedies in oligopolistic markets. Hence, the general guidance provided by the Notice would apply both to coordinated effects and unilateral effects. However, the Commission's study on remedies which was published in 2005[520] explicitly discusses remedies which address competition concerns in oligopolistic markets.[521] In oligopolistic markets, the impact of remedies on third parties and on markets in general may also become relevant in the design of remedies.[522]

According to the study - which examines remedies under the dominance test - the Commission has applied fundamentally similar types of remedies in cases where a merger would have resulted in collective dominance compared to those resulting in single dominance.[523] Collective dominance was mostly addressed by divestitures or remedies that sever influence in a competitor.[524] Exceptionally, the Commission has accepted remedies which stop information flow between competitors.[525] In certain cases, the merging parties committed to exit from a joint venture.[526] Also, other remedies such as a commitment to grant access and to remove price transparency were applied.[527]

The aim of a divestiture is to create a new competitor in the market or to strengthen an existing competitor who would exercise a sufficient competitive constraint on the merged entity. Divestiture may consist of a controlling stake in a company, a business unit that needs to be carved out from a greater company structure, a package of assets of one or more merging firms, or a provision to grant a long-term exclusive licence.[528] For example, in the *Nestlé/Perrier* case, Nestlé committed to sell off brands to a suitable purchaser who meets the

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[519] Cook and Kerse (1996), p. 137.
[520] Merger Remedies Study.
[521] In about 12% of the remedies analysed in this study the purpose of the remedy was to prevent coordinated effects whereas in 84% of the analysed remedies, the purpose of the remedy was to prevent a single dominant position post-merger. Merger Remedies Study, pp. 21, 139.
[522] It has been questioned whether remedies can affect third parties that are not parties to the merger. See, e.g. Cook and Kerse (1996), p. 137.
[523] Temple Lang, (2002), p. 6.
[524] Merger Remedies Study, pp. 22, 122.
[525] Merger Remedies Study, p. 122.
[526] Merger Remedies Study, p. 22.
[527] Merger Remedies Study, p. 122.
[528] Merger Remedies Study, pp. 3, 22.

requirements established in remedies.[529] A purchaser will be accepted by the Commission.

In one case discussed in the study a divestiture was assessed to result in competition concerns in the form of collective dominance.[530] The Commission argued that a large competitor as a purchaser of the divested business may entail risks of coordination among equally strong competitors and concluded that the purchaser did not compete fully with the merged entity. In practice, the purchaser would replace one of the two players in the pre-merger collusive duopoly.[531] Divestiture is only accepted if it maintains or restores competition in the market. This condition is not fulfilled if remedy merely creates another non-oligopolist or a weak oligopolist. The characteristics of the proposed purchaser are thus important.[532]

A commitment to exit from a joint venture requires that a controlling stake is transferred to a suitable purchaser. In most cases, the purchaser of the divested assets will be a partner in a joint venture.[533] Concerns that relate to collective dominance may also be addressed by the divestiture of a minority stake in a joint venture.[534] In addition, remedies have also consisted of breaking the links with other members of an oligopoly, as, for example, in the *Kali und Salz/MdK/Treuhand* case.

Collective dominance has also been addressed by access remedies. Access remedies consist, for example, of abandoning infrastructure fee[535] or providing a non-discriminatory access to an essential facility.[536] Some remedies such as a commitment to decrease price transparency has, according to the study, removed competition concerns only partially. In one case discussed in the study, the commitment to decrease price transparency by abandoning the price quotation system was, however, part of a remedy package which addressed coordination. In this case, the remedy package as a whole removed concerns of a collective duopolistic position.[537]

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[529] For the requirements set for a purchaser, see Remedies Notice, paras 48-49.
[530] Merger Remedies Study, p. 83.
[531] Merger Remedies Study, p. 103.
[532] Temple Lang (2002), p. 6.
[533] Merger Remedies Study, p. 22.
[534] Merger Remedies Study, p. 65.
[535] Merger Remedies Study, p. 116.
[536] Temple Lang (2002), p. 6.
[537] Merger Remedies Study, p. 122.

In the study, the Commission also assessed the application of so-called "ring-fencing" obligations. In "ring-fencing" formal information flows between firms in the market are halted. In one case discussed in the study, the industry concerned was characterised by informal information links, including channels providing for pricing transparency. Information exchanges were thus difficult to prevent.[538] The Commission noted that the common price quotation system creating price transparency was formally abandoned. However, in practice price coordination was assessed to continue in a less formalised scheme.[539]

Even if a commitment to sever influence in a competitor was not analysed in the Merger Remedies Study, the Commission found that this type of commitment was particularly important in situations where the Commission had concerns regarding coordinated effects among a few strong competitors and where the influence that competitors have on each other or the information they exchange enables them to better coordinate market behaviour or monitor deviations.[540] If collective dominance derives from shareholding or contractual links, ending those links might be a sufficient remedy.[541]

In oligopolistic markets remedies may address the incentive to deviate from the coordinated action or to decrease the ability to punish the deviator or to increase the ability of the other market participants to jeopardise the outcome of coordination. The latter effect may be achieved, for example, by lowering the barriers to entry. As stated above, remedies may also be addressed to reduce market transparency.

4.4 Assessment Criteria for Coordinated Effects

4.4.1 Criteria Provided in Merger Regulation

The criteria provided in the Merger Regulation do not distinguish between coordinated effects and unilateral effects. The Regulation does not provide any information about the order of the assessment, either, i.e. whether unilateral

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[538] Merger Remedies Study, p. 65.
[539] Merger Remedies Study, pp. 123, 331.
[540] Merger Remedies Study, p. 165.
[541] Temple Lang (2002), p. 6.

effects should be assessed first and, if they were not found, coordinated effects should be assessed.[542]

Article 2(1) of the Merger Regulation provides information on the criteria according to which the Commission must assess the compatibility of a merger with the common market. Article 2(1)(a) states that the Commission shall take into account the following factors:

> "the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned [543] and the actual or potential competition from undertakings located either within or outwith the Community."

Article 2(1)(b) further states that the Commission shall take into account:

> "the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate customers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition".

The market position of undertakings concerned refers to the market shares and potential competitive advantages of firms. [544] Competition advantages may consist, for example, of economies of scale and scope, privileged access to supply, a highly developed distribution and sales network, access to important facilities or to leading technologies, access to specific inputs such as physical or financial capital and other strategic advantages. [545] Competitive advantages may also consist of the product range and brand image resulting from advertising. Competition advantages can increase barriers to entry and therefore lead to the creation of market power.[546] They can be categorised in several ways, some of

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[542] Under the dominance test, the Commission started the analysis with the assessment of a single dominant position. If this was not found, the second step of the analysis is the assessment of a collective dominant position. If a collective dominant position was not found either, the Commission might have assessed if the market conditions in any case created a strong incentive to engage in anti-competitive parallel behaviour. See, e.g. Case IV/M.315 - *Mannesmann/Vallourec/Ilva*.

[543] The markets concerned are defined in the Form CO.

[544] Commission XXIInd Report on Competition Policy 1992, p. 138.

[545] Commission XXIInd Report on Competition Policy 1992, p. 139; EU Horizontal Merger Guidelines, para. 70; Hautala (2002), p. 46.

[546] Commission XXIInd Report on Competition Policy 1992, p. 139.

which are overlapping. Some of these advantages are discussed in the EU Horizontal Guidelines in the context of barriers to entry.

Some of the factors appraised pursuant to Article 2 of the Merger Regulation are similar to basic conditions and structural elements of the SCP framework. Some of the factors are also familiar from the assessment of dominance under Article 102 TFEU[547], i.e. the criteria which are applied to the assessment of an abuse of a dominant position.[548] The similarity of terminology with regard to the concept of a dominant position does not necessarily mean that the provisions are interpreted in the same way. Some of the factors were also presented in the early drafts of the old Merger Regulation.[549]

Even if the basic principles in the assessment of coordinated effects under the Merger Regulation are not much different from those applied to unilateral effects, coordinated effects are more complex to assess. Despite the complexity the Commission has elaborated and refined the criteria in its decision practice. In addition, in the light of case practice it is clear that different markets function in different ways, and that there is no universal model for the assessment of oligopolies. The assessment takes place case-by-case.[550]

However, the Commission had benefited from previous experience with regard to complex single dominant position cases and used that experience in collective dominance cases, provided that the market setting is appropriate for such a

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[547] These factors are i) the market position of the undertakings concerned and their economic and financial power, ii) the structure of supply and demand, the opportunities available to suppliers and users, iii) legal or other (factual) barriers to entry, and iv) supply and demand trends. Langeheine (1991), p. 489. It should be noted that Fine (1991), p. 150 mentioned only factors i-iii.

[548] The Court of Justice has relied on factors such as the market shares of the firm concerned and of its competitors, the economic advantages over competitors, the existence of any barriers to entry and the structure of demand and supply. Langeheine (1991), p. 488.

[549] The Commission proposal of November 1988 for the Merger Regulation refers e.g. to "in particular to the *market position* of undertakings concerned and to their economic and financial power, to opportunities of choice available to supplier and users, to their access to supplies or markets, to the structure of the markets affected taking into account international competition, to legal and factual barriers to entry, and to supply and demand trends for the relevant goods and services. See Article 2 of the Amended proposal for a Council Regulation (EEC) on the control of concentration between undertakings, COM (88) 734 final revised version, 30 November 1988. OJ 1989 C 22/14. The same list of factors was also seen earlier in the Commission proposal in April 1988. See Article 2 of the Amended proposal for a Council Regulation (EEC) on the control of concentration between undertakings, COM (88) 97 final. 25 April 1988. OJ 1988 C 130/4.

[550] Drauz (2000), p. 2.

transaction.[551] One example is the theory of raising rivals' costs, which has enabled the Commission to conclude on the creation of a single dominant position. It is presumable that the Commission will also conclude that the possibility of raising rivals' costs may create a situation where co-ordination among the merged entity and the competitors would be rational and sustainable in the long run. Another example is bidding markets. The Commission has stated that an oligopoly could be created and sustained in markets where business is done exclusively by way of tenders.[552]

The interdependence among the members of an oligopoly and certain market characteristics, such as transparency and punishment possibilities, may be so strong that coordinated behaviour would not only have become possible, but also profitable for all the players.[553] This is a situation of non-coordinated game with coordination as a dominant strategy.

4.4.2 Criteria Provided in Horizontal Merger Guidelines

According to the EU Horizontal Merger Guidelines, the Commission assesses whether the members of an oligopoly are able to reach a common understanding on the terms of coordination and whether the coordination is likely to be sustainable. In order to conclude that coordination is sustainable, three conditions have to be fulfilled, i.e. the ability to monitor, the existence of a deterrent mechanism and the inability of third parties to jeopardise the collusive outcome.[554] The ability to reach the terms of coordination is arguably a fourth element which is considered necessary for coordination to emerge and to be sustainable.[555] All these elements are considered to be cumulative. [556]

The EU Horizontal Merger Guidelines state that coordination is more likely to emerge in markets where it is relatively simple to reach a common understanding on the terms of coordination. [557] Coordination is more likely to emerge if

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[551] Drauz (2000), p. 4

[552] Case COMP/M.1939 - *Rexam/American National Can;* Drauz (2000), p. 5.

[553] Drauz (2000), p. 2.

[554] EU Horizontal Merger Guidelines, para. 42. This will allow the Commission to assess whether a merger would lead to i) an increased risk of coordination occurring or to ii) coordination being made easier or more successful. See also Amelio et al. (2009), p. 92; Bishop and Ridyard (2003), p. 361. However, it has been argued that the threat of punishment as a deterrent is not in accordance with game theory insights. Markopoulos (2012), p. 326.

[555] Amelio et al. (2009), p. 92.

[556] EU Horizontal Merger Guidelines, para. 42; Dethmers (2005), p. 641.

[557] EU Horizontal Merger Guidelines, para. 41.

competitors can easily arrive at a common perception as to how the coordination should work. Coordinating firms should have similar views regarding which actions would be considered to be in accordance with the aligned behaviour and which actions would not.[558] The Guidelines further state that a common understanding on the terms of coordination is easier to reach if economic environment is less complex and more stable. For instance, coordination is easier among a few players and on a price for a single, homogenous product. Similarly, coordination on a price is easier when demand and supply conditions are relatively stable.[559]

According to the EU Horizontal Merger Guidelines, the reduction in the number of firms in a market may in itself facilitate coordination. The reduction of firms refers to the increase in market concentration. A merger may also increase the likelihood or significance of coordinated effects by eliminating a 'maverick' that has a history of preventing or disrupting coordination, for example, by failing to follow price increases set by competitors, or has characteristics that give it an incentive to favour different strategic choices than its competitors would prefer. If the merged entity adopted strategies similar to those of the competitors, the remaining firms would find it easier to coordinate, and the merger would increase the likelihood, stability or effectiveness of coordination.[560]

The EU Horizontal Merger Guidelines state that a volatile demand, a substantial internal growth by some firms in the market or a frequent entry by new firms may indicate that the current situation is not sufficiently stable in order to make coordination likely.[561] In markets where innovation is important, coordination may be more difficult since innovations may allow one firm to gain a major advantage over its rivals.[562] Coordinating firms may also find ways to overcome problems stemming from complex economic environments. They may, for instance, establish simple pricing rules that reduce the complexity of coordinating on a large number of prices. Pricing rules may, for example, consist of establishing a small number of pricing points or having a fixed relationship

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[558] EU Horizontal Merger Guidelines, para. 44.

[559] See, e.g. Case COMP/M.2097 – *SCA/Metsä Tissue*, para. 148. See also the EU Horizontal Merger Guidelines, para. 45.

[560] EU Horizontal Merger Guidelines, para. 42.

[561] EU Horizontal Merger Guidelines, para. 45.

[562] EU Horizontal Merger Guidelines, para. 45. A significant advantage for one company acts as an incentive to defect from coordination. This may reduce both the value of future coordination and the amount of harm that rivals would be able to inflict. See the Draft EU Horizontal Merger Guidelines, para. 70.

between certain base prices and a number of other prices, such that prices basically move in parallel.[563]

Firms may also reach a common understanding of the terms of coordination with the help of publicly available key information, the exchange of information through trade associations, or information received through structural links such as cross-shareholding or participation in joint ventures. The more complex the market situation is the more transparency or communication is needed to reach a common understanding.[564] Cross-shareholding or participation in joint ventures have also been recognised to promote aligning incentives among the coordinating firms.[565]

The EU Horizontal Merger Guidelines further state that firms may find it easier to reach a common understanding on the terms of coordination if they are relatively symmetric[566] in terms of cost structures, market shares, capacity levels and levels of vertical integration.[567]

The Commission will pay particular attention to the change the merger may bring about with respect to the ability of firms to reach the terms of coordination.[568] For example, a merger may increase the symmetry of firms by making the market shares, the levels of capacity usage, the degree of vertical integration or the cost structures of these firms more similar. A merger may also involve a maverick, i.e. a firm which in the past has consistently shown to prefer lower prices than its competitors. If the merged entity followed pricing strategies similar to those of competitors, the remaining firms would find it easier to coordinate on desirable prices, and the merger would increase the likelihood of coordination.[569] Some of the above-mentioned factors which are relevant for reaching terms of

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563 EU Horizontal Merger Guidelines, para. 47. Compare this to facilitating practices.

564 EU Horizontal Merger Guidelines, para. 47.

565 EU Horizontal Merger Guidelines, para. 48.

566 See Case T-102/96 *Gencor v Commission*, para. 222; Case IV/M.190 - *Nestlé/Perrier*, paras 63-123.

567 In assessing whether or not a merger may increase the symmetry of various firms present in the market, efficiency gains may provide important indications. See the EU Horizontal Merger Guidelines, para. 48. The Draft EU Horizontal Merger Guidelines stated in para. 53 that the symmetry among firms enhances the probability that firms have compatible incentives to coordinate and, in particular, that they agree on what are desirable terms of coordination.

568 EU Horizontal Merger Guidelines, para. 42. This will allow the Commission to assess whether a merger would lead to the i) an increased risk of coordination occurring or to ii) coordination being made easier or more successful.

569 EU Horizontal Guidelines, para. 42.

coordination are similar to those indicating the likelihood of coordination, which justifies an overall assessment.

The EU Horizontal Merger Guidelines also replicate the three conditions established by the Court of the First Instance in the *Airtours v Commission* case and state that the conditions are necessary for coordination to be sustainable.[570] The Guidelines firstly state that coordinating firms must be able to monitor to a sufficient degree each other's behaviour in order to assess whether the terms of coordination are being adhered to. Secondly, it is required that there is some form of credible deterrent mechanism that can be activated if deviation is detected, so that the members of an oligopoly have an incentive not to depart from the coordinated prices. The deterrence may, for example, consist of the cancellation of joint ventures or other forms of cooperation or selling of stakes in jointly owned firms. [571] It may also consist of the breakdown of the coordination.[572] Thirdly, the reactions of outsiders, such as current and future competitors not participating in the coordination, as well as customers, should not be able to jeopardise the results expected from the coordination.[573]

A merger, since it potentially affects all these factors, may render coordinated price increases likely.[574] Here, wording of the Guidelines is slight different from that of the judgment. The Court states that "three conditions are necessary for a finding of collective dominance" without referring to the sustainability. The *sustainability* criterion is only referred in the context of deterrent mechanism where the Court states that "tacit coordination must be sustainable over time".[575]

Even if the criteria for reaching the terms of coordination and the three conditions are fulfilled and it can therewith be concluded that the market is

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[570] It should be noted that the 1992 US Horizontal Merger Guidelines state in Section 2.1 that successful coordination entails reaching terms of coordination and an ability to detect and punish deviations. However, the 1992 US Horizontal Merger Guidelines did not explicitly state in Section 2.12 that the reactions of outsiders should be taken into account while assessing the successfulness of coordination.

[571] EU Horizontal Merger Guidelines, para. 55.

[572] Amelio et al. (2009), p. 92. It has been argued that punishment mechanism may not need to be more complex than temporary abandonment of the terms of coordination by other firms in the market. See US 1992 Horizontal Merger Guidelines, Section 2.12; Markopoulos (2012), p. 328.

[573] This refers to the inability of competitors and consumers to contest the new equilibrium. Case T-342/99 *Airtours v Commission*, para. 62; EU Horizontal Merger Guidelines, para. 41; OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 311.

[574] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 312.

[575] Case T-342/99 *Airtours v Commission*, para. 62.

prone to coordination, substantial coordination will not necessarily occur. The EU Horizontal Merger Guidelines state that in assessing the likelihood of coordinated effects, the Commission takes into account all available relevant information on the characteristics of the market concerned, including both the structural features and the past behaviour of the firms.[576]

4.4.3 Development of Criteria in EU Case Practice

The development of the assessment criteria for coordinated effects can be divided into three different phases: i) the criteria *prior* to the judgment of the Court of First Instance in the *Airtours v Commission* case, termed the diversity phase, ii) the criteria established by the Court *in* the *Airtours v Commission* case, termed the formalisation phase and iii) the criteria *after* the *Airtours v Commission* case, termed the stablisation phase. The *Airtours v Commission* case can thus be considered as a watershed in merger assessment in oligopolistic markets.

The first phase is characterised by diversity of the assessment criteria, i.e. a type of a checklist approach. Under the checklist approach a number of different criteria are applied in no particular structure or order. Among these criteria are, for example, concentrated market structure, market transparency, structural or economic links and other factors which were considered condusive to coordination. In the second phase, the criteria are more formalised. The Court of First Instance provides three necessary conditions. The conditions are cumulative, i.e. they all have to be identified in order to conclude that the merger would result in coordinated effects. The Court's judgment is interpreted so that the conditions are not sufficient, i.e. something else needs to be proven. The Court, however, does not provide any guidance on these additional factors or conditions. The third phase describes the situation where the criteria are stabilised. It shows how the criteria in the *Airtours v Commission* case are applied in cases that follow the Court's judgment. However, some new openings for discussion can also be identified. One of the new openings concerns the approach that the three conditions should not be assessed mechanically in isolation of the markets.

Under the checklist approach, the Commission evaluates markets affected against certain characteristics which are deemed to facilitate tacit

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[576] See Case IV/M.190 – *Nestlé/Perrier*, paras 117-118; The EU Horizontal Merger Guidelines, para. 43.

coordination.[577] Below, some of the factors of the checklist approach are discussed. As stated in the Commission XXIInd Report on Competition Policy in 1992, market shares are relevant for the determination of the degree of concentration of the market. Market concentration is an important factor in the analysis of whether or not, in conjunction with other market structures and conditions, the exercise of collective market power is possible and likely to occur.[578] The Commission XXVIth Report on Competition Policy in 1994 confirmed this approach by stating that the starting point of the analysis of a collective dominant position is the market concentration. However, the increase in concentration has to be significant:[579] the mere fact that a market is concentrated does not necessarily warrant a finding of a collective dominant position.[580]

In previous cases the Commission tended first to analyse whether in light of the structural features the markets were conducive to coordination.[581] Collective dominance has mainly been established in EU case practice where there are two or maximum three main firms in the market.[582] The first cases in which collective dominance was established concerned relative symmetric duopolies.[583] Later, more than two firms would hold a dominant position collectively.[584] The Commission has assessed the collective dominance of three companies, for example, in the *Airtours/First Choice* case. This was the first case which was prohibited on the basis of collective dominance held by three firms.[585] The EU case practice shows that no firm guidance regarding the number of the members of an oligopoly can be given.[586]

In addition to the market concentration, the Commission has also assessed other factors, such as market transparency, product homogeneity, a moderate level of

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[577] Lexecon Competition Memo, The Airtours Case, 12 November 1999; Guidelines for Electric Communications, para. 97. Compare these characteristics to facilitating and complicating factors which have applied in the US.

[578] Commission XXIInd Report on Competition Policy 1992, p. 138.

[579] Commission XXIVth Report on Competition Policy 1994, pp. 152-153.

[580] Guidelines for Electric Communications, para. 100.

[581] Christensen et al. (1999), p. 249.

[582] Peeperkorn (1999), pp. 32-33. As regards the number of firms, see e.g. Ivaldi et al. (2003).

[583] See, e.g. Case IV/M.190 - *Néstle/Perrier*. Bundeskartellamt (2001), pp. 19-20.

[584] Bundeskartellamt (2001), pp. 19-20.

[585] Case COMP/M.1524 - *Airtours/First Choice*; Kokkoris (2011), pp. 112-118; Bundeskartellamt (2001), pp. 19-20.

[586] In Case COMP/M.1383 - *Exxon/Mobil*, national-wide oligopolies of more than four members would constitute collective dominance in several national petrol distribution markets. Drauz (2000), p. 2; Bundeskartellamt (2001), pp. 19-20.

growth and low rate of technological change, high barriers to entry, lack of countervailing buyer power, and the symmetry of market positions of the members of an oligopoly.[587] The Court confirmed in the *Gencor v Commission* case that the Commission could assess a number of factors in its analysis, i.e. a so-called checklist approach.[588] Even if the Commission had not excluded that collective dominance could also exist in other market conditions, markets with these characteristics are prone to coordination, particularly if the market concentration is high.[589] It should be noted that the list of factors is not exhaustive and that factors are not cumulative.[590]

The Commission has stated that the existence of links[591] is not a necessary condition for a finding of collective dominance. However, where such links exist, they can be relied upon to explain, together with other criteria,[592] whether coordinated effects are likely to arise. In the absence of such links, it is necessary to consider a number of characteristics of the market in order to establish whether a market is conducive to collective dominance.[593] The Commission will carefully examine the intensity of competition that exists among the members of an oligopoly[594] and will take into account the existence of links between undertakings, market transparency and demand conditions, in particular price elasticity and growth prospects.[595] For example, in the *Airtours/First Choice* case, the Commission analysed a series of business links between competitors. The links consisted of, among other things, cross-shareholdings, interlocking directorships and swap agreements. Prior to the *Compagnie Maritime Belge v*

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[587] Christensen et al. (1999), p. 249. These criteria are also summarised in Annex II of the Framework Directive. According to the Annex, two or more undertakings can be found to be in a joint dominant position if, even in the absence of structural or other links between them, they operate in a market, the structure of which is considered to be conducive to coordinated effects. Without prejudice to the case-law of the Court of Justice on joint dominance, this is likely to be the case where the market satisfies a number of appropriate characteristics, *in particular* in terms of market concentration, transparency and other characteristics provided in the checklist. See Guidelines for Electric Communications, para. 97.

[588] Faull and Nikpay (1999), p. 249.

[589] Faull and Nikpay (1999), p. 249.

[590] This is stated in Annex II of the Framework Directive. See Case COMP/M.2498 - *UPM-Kymmene/Haindl* and Case COMP/M.2499 - *Norske Skog/Parenco/Walsum*. Guidelines for Electric Communications, para. 98.

[591] Compare to Article 102 TFEU requirements to establish joint dominance.

[592] It could be asked whether this means that in the presence of links there is a need for only one characteristic.

[593] Guidelines for Electric Communications, para. 98.

[594] Compare to the assessment of internal competition v external competition.

[595] In Case IV/M.315 *Mannesmann/Vallourec/Ilva*, the Commission opened in-depth investigation also in the absence of links. Lowe (1995), p. 150.

Commission[596] case and the *Gencor v Commission* case, a finding of collective dominance was arguably based on the existence of economic links, in the sense of structural links, or other factors which could give rise to a connection between the undertakings concerned.[597]

As regards the role of structural links between the members of an oligopoly, the Court of First Instance has explicitly stated in the so-called *Italian Flat Glass (SIV)* case[598] that the reference to structural links was merely by way of example, and that structural links are not necessary for a finding of a collective dominant position. It can be concluded that the focus of the analysis is on the likelihood of tacit coordination, not on structural links.[599] According to the Commission, the multi-criteria approach that is applied to the assessment of a single dominant position is also used for the assessment of a collective dominant position. The focus of the analysis is on the particular combination of factors that determine how competition takes place in that market, not on the presence of certain individual factors.[600]

While the above-mentioned characteristics are often presented as a list, it is necessary to make an overall assessment rather than mechanistically applying a "checklist". Depending on the circumstances of the case, the fact that one of the elements associated with a collective dominant position cannot be clearly established may not be decisive to exclude the coordinated outcome.[601] Even where most of the criteria are not met, collective dominance may still be established.[602] Where most, if not all, of the above-mentioned criteria are met, the members of an oligopoly have a strong incentive to converge to a coordinated market outcome and refrain from reliance on competitive conduct. This will be the case where the long-term benefits of coordination outweigh any short-term gains resulting from resorting to competitive conduct.[603] The factors must be assessed in the context of the specific market. This means that the emphasis of different factors may vary according to the market.

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[596] Joined Cases C-395-396/96 *Compagnie Maritime Belge v Commission*. See also Case T-24/93 *Compagnie Maritime Belge v Commission*.

[597] Guidelines for Electric Communications, para. 90; Korah (1999), p. 340.

[598] Joint Cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro SpA, Fabbroca Pisana SpA and PPG Vernante Pennitalia SpA v Commission*.

[599] Faull and Nikpay (1999), p. 249.

[600] Commission XXIVth Report on Competition Policy 1994, p. 152.

[601] Guidelines for Electric Communications, para. 98.

[602] Guidelines for Electric Communications, para. 104.

[603] Guidelines for Electric Communications, para. 99.

The most important criteria are those which are critical to a coordinated outcome in the specific market. For example, in the *Norske Skog/Parenco/Walsum*[604] case, the Commission stated that even if the markets for newsprint and wood-containing magazine paper had elements that were prone to coordination such as concentrated markets, homogenous products, highly inelastic demand, limited buyer power and high barriers to entry, nonetheless factors such as the limited stability of market shares, the lack of symmetry in cost structures, the lack of transparency of investment decisions and the absence of a credible retaliation mechanism rendered that coordination among the members of an oligopoly was not likely nor sustainable.[605]

The Commission has also analysed past behaviour such as the exchange of information or joint entry deterrence actions in order to examine whether there is any evidence of past coordination and in order to estimate the future conduct of the merged entity.[606] In the *Nestlé/Perrier* case, for example, the exchange of price information indicated a tacit collusion prior to the merger.

A historical analysis may provide significant clarifications. For example, the variations of market shares and prices over a long period of time would provide information about the likely impact of certain operations on the behaviour of competitors and therewith provide assumptions with regard to their likely reactions. For example, in the *Airtours/First Choice* case, the Commission analysed previous price wars and their effects on prices. This refers to so-called natural experiments, a concept which is familiar from the US Horizontal Merger Guidelines.

As regards past coordination as evidence for establishing coordinated effects, the Commission stated in the draft EU Horizontal Merger Guidelines that it would not likely approve a merger if coordination already took place prior to the merger unless the merger would disrupt such coordination.[607] This statement was widely criticised and was finally left out from the final version of the Guidelines. The EU Horizontal Merger Guidelines instead now state that evidence of past coordination is important if the market characteristics have not changed

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[604] Case COMP/M.2499 – *Norske Skog/Parenco/Walsum*.

[605] Guidelines for Electric Communications, para. 101.

[606] Christensen et al. (1999), p. 249.

[607] See the Draft EU Horizontal Merger Guidelines, para. 41. The Draft Guidelines also stated in para. 48 that "similarly, firm may be vigorously competing prior to the merger in ways that make the emergence of coordination unlikely." See also Ridyard (2004), p. 5.

appreciably or are not likely to do so in the near future.[608] Likewise, evidence of past coordination in similar markets may be useful information. [609] Past behaviour has usually been considered as additional evidence in the structural test.

The assessment of coordinated effects analysis will normally involve both the assessment of the impact on the market, for example, the increase of transparency or entry barriers, as well as the incentives to compete and the possibilities of retaliation. Under certain circumstances, the merger will result in a situation where there will be few incentives for the members of an oligopoly to compete.[610]

4.5 Diversity of Assessment Criteria

4.5.1 Checklist Approach in *Nestlé/Perrier* Case

On 25 February 1992, the Swiss food company Nestlé notified a public bid with the object of acquiring 100% of the shares of Source Perrier SA, which is a manufacturer and the leading supplier on the French bottled water market with various famous brands.[611] As part of the transaction, the merged entity would subsequently sell off one the main Perrier brands, Volvic, to BSN, which is the third major player in the French bottled water market. Nestlé already owned two major brands of bottled water in France. The Commission stated that the merger between Nestlé and Perrier would lead to a market structure where the previous oligopolistic structure of three parties, namely Nestlé, Perrier and BSN, with a combined market share of 82.3%, would turn to a duopoly of the merged entity and BSN.

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[608] See, e.g. Case IV/M.580 – *ABB/Daimler-Benz*, para. 95. The EU Horizontal Merger Guidelines, para. 43.

[609] EU Horizontal Merger Guidelines, para. 43.

[610] Christensen et al. (1999), p. 249.

[611] Through the acquisition of Perrier, Nestlé, which already owned two well-known brands (Vittel and Hepar) intended to gain control over four other major brands (Contrex, Perrier, Saint-Yorre and Vichy). Subject to the acquisition of Perrier being completed, Nestlé had concluded an agreement on 30 January 1992 to sell Volvic, the fifth major brand of Perrier Group to BSN, the second main supplier on that market with two major brands (Evian and Badoit).

In this case, the Commission assessed both a single and collective dominance. The Commission stated that in the case of the sale of Volvic to BSN[612], the proposed merger would lead to collective dominance, which would significantly impede effective competition in the French bottled water market, [613] and therewith would very likely cause harm to consumers.

In its decision, the Commission referred to a number of factors such as high post-merger market shares, capacities, limited reactions of outsiders,[614] the weakness of price competition between parties, the inelasticity of price, the increased likelihood of parallel behaviour, the artificial transparency of sales and prices through a trade association, and high barriers to entry.[615] Some of the factors assessed were structural such as increased market concentration and increased symmetry between the two main suppliers. Some of the factors were behavioural such as the past pricing behaviour and dissemination of brand specific up-to-date sales figures through the trade associations.[616]

The first concern by the Commission related to the degree of market concentration and the number of competitors. The French bottled water market was already highly concentrated prior to the merger and after the merger Nestlé, Perrier and BSN would have had a market share of 82% of the total French water market by value and 75% by volume. None of the competitors would match the size, the range of well-known brands and the geographic spread of Nestlé or BSN.

The increased likelihood of parallel behaviour was assessed to result from the elimination of a major competitor with the biggest capacity reserves and sales volumes in the market which would make anti-competitive parallel behaviour leading to collective abuses much easier. The mineral water suppliers in France had developed instruments of transparency, facilitating a tacit coordination of pricing policies and instruments to control and monitor each other's behaviour. The Commission argued that as a result of the merger, these instruments could become less indispensable. The relatively low price elasticity would facilitate and

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[612] The Commission also assessed dominance without the sale of Volvic to BSN and stated that the proposed merger in that case would create a dominant position for the new entity with the power to behave to an appreciable extent independently of its competitors, its customers and ultimately its consumers. Thus, the Commission concluded that in this case there would be a single firm dominance.

[613] The Commission came to this conclusion by assessing the high market shares and capacities of Nestle and BSN after the merger and the sale of Volvic to BSN. It also took into consideration the insufficient competitive counterweight from local suppliers.

[614] Amelio et al. (2009), p. 92.

[615] Cook and Kerse (1996), pp. 135-136.

[616] Cook and Kerse (1996), pp. 135-136.

reinforce the likelihood of parallel pricing strategies.[617] After the merger, the two largest firms on the market would have symmetrical market positions. Since any aggressive competitive action by one would have a direct and significant impact on the activity of the other supplier which would result in harming the profitability of both competitors without improving their sales volumes, a reciprocal dependency would create a strong common interest and provide an incentive to maximize profits by engaging in anti-competitive parallel behaviour.

Other firms were not considered sufficient to constrain the market power of the merged entity as they were local spring and mineral water suppliers, which were too dispersed and too small to constitute significant alternative to national water suppliers. Barriers to entry were also so high that actual entry or threat of entry would not have jeopardised the ability of Nestlé and BSN to profitably increase their prices jointly in the future.

In this case, the Commission considered that Nestlé's and BSN's past conduct, i.e. the exchange of price information, could indicate their conduct in the future. This was supported by the fact that Nestlé and BSN had together reacted strongly to an attempt by an external firm to acquire Perrier. The Commission considered such a reaction as a "joint entry deterrence action".[618] These factors seem to indicate the likelihood of further tacit collusion. In addition, the agreement between Nestlé and BSN to share Perrier, i.e. the sale of Volvic to BSN, was a sign of cooperative rather than competitive behaviour.[619]

The merger was approved conditionally. Nestlé would, for example, sell off brands to a third firm in order to create a new third force on the market, which would be strong and viable enough to compete with the merged entity.

4.5.2 Market Concentration in *Mannesmann/Vallourec/Ilva* Case

The *Mannesmann/Vallourec/Ilva* case concerned an establishment of a joint venture DMV by Dalmine, MRW and Valtubes. Dalmine is an Italian company active, *inter alia*, in the steel sector. Its ultimate parent is Ilva Spa, an Italian state-owned company. MRW is a German company active, *inter alia*, in the production of pipes and tubes, the production of steel and pre-material for pipes

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[617] The fact that the prices moved in parallel, as was seen, for example, in Case IV/M.190 - *Nestlé/Perrier*, may result from the exchange of price information. In some cases, price information and brand-specific and up-to-date sales information is exchanged through the trade associations.

[618] Commission XXIInd Report on Competition Policy 1992, p. 147.

[619] Commission XXIInd Report on Competition Policy 1992, p. 147.

and tubes. It is a subsidiary of Mannesmann AG. Valtubes is a French company active in the production and sale of pipes and tubes as well as the related products. It is a subsidiary of Vallourec SA. Each of the company would hold 33.33% of DMV's shares. DMV would own, manage and control the parties' previous seamless stainless steel tube businesses.

The Commission stated that the high level of market concentration and the similarity of market shares of the two principle producers, i.e. Sandvik with a market share of 33% and DMV with a market share of 36%, constituted *prima facie* a strong incentive to engage in anti-competitive parallel behaviour in the steel tube sector. The Commission also stated that only four European players would remain on the market, with economic structural differences. The Commission took into account the market shares and the size, the production capacities and the cost situation[620] of the merged entity and its competitors, as well as the market transparency[621], and the customers' market position. The causality runs from the market structure to anti-competitive behaviour.

In addition to market concentration, incentives for anti-competitive parallel behaviour consist of stagnant and inelastic demand, the similarities between price lists of the main suppliers and on the commercial contacts between the suppliers and customers. Increased market transparency enabled each competitor to have some knowledge of the other competitors' prices. Even if the majority of factors assessed suggested coordination, the Commission considered that the merger would not result in single dominance nor collective dominance,[622] mostly because of the competitive constraint caused by potential competition. A small but significant price increase was held likely to provoke further entry by Japanese competitors. In addition, Eastern European competitors, which had certain cost advantages, were assessed to be likely to enter the market in a significant way in the near future. The merger was thus cleared without conditions. However, the factors assessed were not considered to

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[620] None was assessed to have a sufficiently significant structural cost advantage to offset against the substantial gains which would result from engaging in anti-competitive parallel behaviour.

[621] Market transparency was high since the market was mature and regular contacts with the customers enabled each to have good knowledge of the other competitor's prices.

[622] This conclusion was also confirmed by the minority of the Advisory Committee. This minority did not consider that the proposed concentration would lead to a joint dominant position which would significantly impede effective competition. In its opinion, a minority emphasised the absence of any structural links between DMV and Sandvik.

weaken the incentive for Sandvik and DMV to engage in anti-competitive parallel behaviour.[623]

4.5.3 Structural Links in the *France and Others v Commission* case

In the *Kali und Salz/MdK/Treuhand* case, the Commission stated that the creation of a joint venture between Kali und Salz and MdK resulted in the creation of collective dominance between the merged entity and the state-owned French company SCPA. The two companies would have held a combined market share of 80% in one of the two relevant geographic markets for the mineral fertiliser kali.[624] In particular, the Commission considered that the close structural links between the duopolists formed an assumption of the lack of internal competition.[625] The Commission also considered other market characteristics such as the stability of market shares of the members of an oligopoly, the increase in the merging parties' market shares, product homogeneity, barriers to entry and mature markets[626] as well as the lack of technical innovation and high market transparency. The merger was cleared subject to the condition that Kali und Salz breaks its links with SCPA.[627]

The case was appealed before the Court of Justice. This was the first time the Commission's power to assess collective dominance was tested before the Union Courts.[628] The Court found that the cluster of structural links between Kali und Salz and SCPA which formed the core of the Commission's decision were not as tight and conclusive as the Commission had concluded.[629] The Court stated that the Commission had not established to the necessary legal standard the existence of a causal link between Kali und Salz and SCPA's structural relationship and the anti-competitive behaviour on the relevant market. The Court judgment was alleged to confirm that the existence of structural links was still essential in the finding of collective dominance and that the Commission needed to analyse the effect of these links on the competitive behaviour of the members of an

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[623] Other factors which were analyzed consisted of structural differences between Sandvik and DMV, production capacity (substantial capacity reserves), cost situation (marginal costs, labour costs, cost savings through innovation), vertical integration, and market transparency.

[624] Bundeskartellamt (2001), p. 18.

[625] Bundeskartellamt (2001), p. 19; Amelio et al. (2009), p. 92; Ysewyn and Caffarra (1998), p. 470; Hacker (1998), p. 42.

[626] Ysewyn and Caffarra (1998), p. 470; Bundeskartellamt (2001), p. 19.

[627] Bundeskartellamt (2001), p. 19; Hacker (1998), p. 40.

[628] Ysewyn and Caffarra (1998), p. 468.

[629] Reynolds (1997), pp. 20-21; Ysewyn and Caffarra (1998), p. 470.

oligopoly.[630] The Court subsequently revoked the Commission's decision but confirmed that the Merger Regulation in principle applied also to cases of collective dominance by two or more competitors.[631]

Some commentators interpreted the decision in a way that the Court of Justice limited the possibility of the existence of collective dominance to cases where there were contractual or structural links between the companies evaluated.[632] This assumption was, however, opposed by the Court of First Instance in the *Gencor v Commission* case in 1999.

4.5.4 Economic Links in *Gencor v Commission* case

In the *Gencor v Commission* case, the Court of First Instance confirmed the Commission's prohibition decision in the *Gencor/Lonrho* case by stating that the merger would have led to the creation of a dominant duopoly in the worldwide market for platinum and rhodium between the merged entity and Amplats.[633] As a result of the merger, the merged entity would have become the second largest company with a market share of 35%, Amplast being the largest company. In addition to the creation of a duopoly, the Commission based its decision on factors such as the product homogeneity, high market transparency, low level of elasticity and moderate growth of demand, the maturity of the production technology, the high barriers to entry, as well as the increased symmetry and similar cost structures of the members of a duopoly.[634] Structural links were not deemed necessary.[635]

The judgment raised the question of whether collective dominance could exist in the absence of links among the members of an oligopoly. The judgment concerned the legality of the Commission's decision in the *Gencor/Lonrho* case, whereby it prohibited the transaction based on the fact that the creation of a

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[630] Ysewyn and Caffarra (1998), p. 470.

[631] Joined Cases C-68/94 and C-30/94 *France and Others v Commission*, paras 168-171; Nera Competition Brief, Power and Responsibility: the ECJ's Kali-Salz Judgment, September 1998, p. 1; Bundeskartellamt (2001), p. 19. The Court also stressed the need for rigorous analysis of the weight of competitors. Compare to Case T-342/99 *Airtours v Commission*, where the Court of the First Instance stated that there is no need for structural links to be established.

[632] Korah (1999), p. 337; See also Bundeskartellamt (2001), p. 19.

[633] Bundeskartellamt (2001), p. 19; Amelio et al. (2009), p. 92.

[634] Bundeskartellamt (2001), p. 19; Amelio et al. (2009), p. 92; Christensen and Owen (1999), p. 22; Caffarra and Kühn (1999), p. 355; Lexecon Competition Memo (1999), p. 1.

[635] Amelio et al. (2009), p. 92.

duopoly would be conducive to collective dominance. The merging parties argued that the Commission had failed to prove the existence of links between the members of an oligopoly within the meaning of the existing case-law.[636]

The Court stated in the *Gencor v Commission* case that collective dominance requires economic links among the members of an oligopoly and that structural links were merely an example of the required relationship.[637] The Court dismissed the parties' application by stating, *inter alia*, that there was no legal precedent suggesting that the notion of economic links was restricted to the notion of structural links between the undertakings concerned. The wording of the Court was as follows:

"[T]here is no reason whatsoever in legal or economic terms to exclude from the notion of economic links the relationship of interdependence existing between the parties to a tight oligopoly within which, in a market with appropriate characteristics, in particular in terms of market concentration, transparency and product homogeneity, those parties are in a position to anticipate one another's behaviour and are therefore strongly encouraged to align their conduct in the market, in particular in such a way as to maximize their joint profits by restricting production with a view to increasing prices. In such a context, each trader is aware that highly competitive action on its part designed to increase its market share (for example price cut) would provoke identical action by the others, so that it would derive no benefit from its initiative. All the traders would thus be affected by the reduction in price levels."[638]

The Court thus opposed the assumption that collective dominance was limited to cases with contractual or structural links between the companies evaluated. The Court clarified that the linking factors are to be interpreted as economic factors, but not limited to structural links.[639] The Court statement has been considered sufficient to demonstrate that structural links are not an inherent part of

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[636] Guidelines for Electric Communications, para. 90.

[637] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, pp. 27-28.

[638] Case T-102/96 *Gencor v Commission*, para. 276. See also OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 28; Christensen and Owen (1998), p. 23.

[639] Case T-102/96 *Gencor v Commission*, para. 275-276. It has been stated that the judgment of the General Court in Gencor v Commission was later endorsed in Joined Cases C-395-396/96 *Compagnie Maritime Belge v Commission*. See OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 310.

collective dominance.[640] The Court accepted that the old Merger Regulation also covered cases in which two market players are linked through economic interdependence.[641] In this case the Court also arguably referred to game theory. As the Court pointed out, market conditions may be such that each undertaking may become aware of common interests, and, in particular, cause prices to increase without having to enter into an agreement or resort to concerted practice.[642]

It has been argued from the *Gencor v Commission* case and the *Compagnie Maritime Belge v Commission* case it follows that, although the existence of structural links can be relied upon to support a finding of collective dominance, such a finding can also be made in relation to an oligopolistic or highly concentrated market whose structure alone is conducive to coordinated effects on the relevant market.[643]

4.5.5 Departure from the Characteristics Conducive to Coordination in *Airtours/First Choice* Case

In the *Airtours/FirstChoice* case, the Commission concluded that the acquisition of First Choice plc by Airtours plc would lead to the creation of collective dominance in the UK short-haul foreign package holiday market (hereinafter the FPH market or tour operating market)[644] between the merged entity and the two other leading tour operators – Thomson Travel Group plc and the Thomas Cook Group Limited.[645] Tour operating markets were also examined by the FCA in the *Fritidsresor/Finnmatkat* case, which is discussed in Chapter 5.

In the *First Choice/Airtours* case, the Commission went beyond its previous practice in oligopoly cases.[646] The merger probably substantially lessened competition, but it did not create or strengthen a dominant position[647] as required under Article 2(3) of the old Merger Regulation. Had the decision been

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[640] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 28; Korah (1999), p. 338.

[641] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 311.

[642] See Case T-102/96 *Gencor v Commission*, para. 277. Guidelines for Electric Communications, para. 91.

[643] Guidelines for Electric Communications, para. 94. See also Haupt (2002), p. 437.

[644] The market is also termed the package tour market.

[645] COMP/IV.1524 – *Airtours/First Choice*, para. 51.

[646] For a critical view see, e.g. Bishop (1999), p. 8. See also Bundeskartellamt (2001), p. 19.

[647] Temple Lang (2002), p. 2.

confirmed by the Court of First Instance, the scope of the dominance test would have been significantly extended.[648] The Commission arguably attempted to enlarge the concept of collective dominance to non-collusive oligopolies.[649]

According to the Commission, there were a number of characteristics in the tour operating market which made the market conducive to collective dominance and these characteristics would remain present after the merger. These characteristics consist of product homogeneity, low demand growth, low price sensitivity of demand, similar cost structures of the main suppliers, high market transparency, extensive commercial links between the major suppliers, substantial barriers to entry and insignificant buyer power of consumers.[650] The Commission also stated that the characteristics were substantially similar, for example, to those discussed in the *Gencor/Lonrho* case.[651] In addition, the merger would reinforce all these characteristics - with the exception of product homogeneity and low demand growth - and would therefore contribute to the creation of collective dominance among the three large vertically-integrated suppliers that would remain after the merger.[652] However, the Court of First Instance disagreed on these characteristics. In addition, the Commission argued differently about some of these characteristics in the latter part of its decision. One of these arguments concerned the nature of the product.[653]

The merger would have reduced a number of suppliers in the FPH market from four to three.[654] The Commission stated that none of the companies held a dominant position by itself.[655] The post-merger market shares were 32% for the merged entity Airtours-First Choice, 27% for Thomson and 20% for Thomas Cook.[656] However, the combined market share of the three large competitors was

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[648] Bundeskartellamt (2001), pp. 19-20.

[649] Dethmers (2005), p. 640.

[650] Case COMP/M1524 – *Airtours/First Choice*, para 87. See also Case IV/M.1016 - *Price Waterhouse/Coopers & Lybrand*.

[651] Case COMP/M.1524 – *Airtours/First Choice*, para 87. See also Case IV/M.1016 - *Price Waterhouse/Coopers & Lybrand*.

[652] Case COMP/M.1524 – *Airtours/First Choice*, para 87.

[653] The Commission stated that the type, location, departure time and quality of package tours vary. Package tours were thus considered to be heterogeneous products with a low market transparency. With such highly differentiated products, coordinating on price alone would not be feasible. In addition, coordinating on capacity is generally viewed to be more difficult than on price because of the time lags involved. Lexecon Competition Memo, The Airtours Case, 12 November 1999; Bundeskartellamt (2001), p. 20.

[654] Bundeskartellamt (2001), pp. 19-20.

[655] Bundeskartellamt (2001), p. 20.

[656] Lexecon Competition Memo, The Airtours Case, 12 November 1999.

assessed to have increased to 85%. In addition, the market structure had substantially changed in the past due to entries and exits.[657]

As regards market shares, the Commission stated that "stable shares help a collusive arrangement, because output is most easily "allocated" on the basis of current market shares". However, market shares in the FPH market are relatively volatile. The Commission's view was that market shares were less volatile if the effects of historic acquisitions were not taken into account. However, this was not relevant for assessing the scope for future coordination.[658]

The Commission argued that the merger would result in collective dominance mainly due to the fact that the companies would know each other's capacities and could react if one of the companies increased its capacity.[659] The weakness of this argument was that the FPH capacity was set 18 months in advance, and that capacity levels were not transparent. Demand would also be dependent on disposable income, which is difficult to predict in advance. In addition, due to external shocks demand was volatile within the FPH market. Barriers to entry and expansion were also considered to be low.[660] Moreover, empirical evidence showed that smaller firms were able to offer substitutes for those of the larger companies at competitive prices and were able to purchase inputs at comparable rates.[661]

The underlying logic for applying the checklist approach was to capture the incentive to deviate from potential future coordination, and the scope for punishing such deviations through harsh competition in the market. The fact that the FPH market capacity was set 18 months in advance and could only be modestly increased in the short term meant that there was no credible punishment mechanism to sustain coordination. Fixed capacity means that the firm implementing the punishment would be unable to serve additional customers in the event of price cuts. This has two implications. Firstly, a firm being "punished" will hardly be punished at all as it will not lose many customers.

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[657] Bundeskartellamt (2001), p. 20. Case T-102/96 *Gencor v Commission*, para. 165, which was considered to echoing Joint Cases C-68/94 and C-30/95 *France and Others v Commission*, paras 223 and 224; the Court recognized that in reviewing a merger it must take account of the discretionary margin implicit in the provisions of an economic nature. Cook and Kerse (2000), pp. 129-130.

[658] Lexecon Competition Memo, The Airtours Case, 12 November 1999.

[659] Temple Lang (2002), p. 2.

[660] This was recognised by the MMC in its recent report on the FPH market. It could be asked to what extent the Commission took into account the MMC's report in its own assessment.

[661] Lexecon Competition Memo, The Airtours Case, 12 November 1999.

Secondly, punishment will be particularly costly for the firms implementing it. Without capacity constraints the punishing firm would obtain a larger number of customers, and the increase in output would partly compensate for the fall in price. If the additional customers cannot be served, the firm only gets the fall in price.[662] The only way to punish would be to raise the capacity increase for the next season. However, it is not an effective punishment. Firstly, a delayed punishment is a less effective deterrent in comparison to the short-term benefits of deviation. Secondly, a delayed capacity increase may not be understood as a punishment in response to a particular past action.[663] The requirement that the punishment should be understood correctly derives from economic theory.

Prior to the *Airtours/FirstChoice* case, tacit collusion was widely understood as a fundamental economic principle behind collective dominance, as confirmed by the Court, for example, in the *Gencor v Commission* case. The Commission appeared to share this view by stating that: "... the question to assess in cases concerned with collective dominance is the likelihood of tacit coordination in the market" The checklist approach is based on the standard textbook characteristics which are assessed to facilitate tacit collusion. It requires that tacit collusion is ultimately being investigated.[664]

In the *Airtours/FirstChoice* case, the Commission departed from the underlying economic principle and stated that collective dominance is "not just about tacit collusion". It is "sufficient for oligopolists to act - independently - in ways which reduce competition".[665] In this case the Commission argued that under certain circumstances oligopolistic markets may be characterized by no or insignificant competition and that "in this situation a mere adaptation to market conditions cause anti-competitive parallel behaviour whereby the oligopoly becomes dominant. Active collusion is, therefore, not required for members of an oligopoly to become dominant."[666] The *Airtours/First Choice* case led to the assessment criteria being less clear than before[667] and it was argued that the case "muddied the water" rather than clarified the concept of collective dominance.

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[662] Lexecon Competition Memo, The Airtours Case, 12 November 1999.

[663] Lexecon Competition Memo, The Airtours Case, 12 November 1999.

[664] Lexecon Competition Memo, The Airtours Case, 12 November 1999. See the Lexecon Competition Memo, June 1999 which discusses the judgment of the General Court and the concept of tacit collusion in a more detailed way. See Christensen and Owen, 1999, p. 23.

[665] Lexecon Competition Memo, The Airtours Case, 12 November 1999.

[666] Christensen et al. (1999), p. 248.

[667] Lexecon Competition Memo, The Airtours Case, 12 November 1999.

In the *Airtours/FirstChoice* case, the merger would arguably not result in either unilateral or coordinated effects. Arguments for tacit collusion, and therewith coordinated effects, were very weak. The standard checklist for collective dominance was not satisfied and there was no effective punishment mechanism, which, according to economics, is a key requirement for tacit collusion.[668] Hence, in this case the Commission arguably attempted to read the SLC test into the Merger Regulation. The argument was criticized by *Temple Lang*. He stated that it was not easy to see how this would work. The old Merger Regulation was based on dominance, which, at least in theory, either exists or not. The old Merger Regulation would not easily apply to a merger merely by reference to the fact that it made the market substantially less competitive than it had previously been.[669]

4.6 Formalisation of Assessment Criteria

4.6.1 Necessary Conditions for Coordination in *Airtours v Commission* Case

In the *Airtours v Commission* case, the Court of First Instance arguably clarified the assessment of coordinated effects.[670] The Court ruled that the following three conditions are *necessary* for coordination: i) the ability of the members of an oligopoly to monitor each others' behaviour, ii) a deterrent mechanism to ensure that there is no incentive to deviate from the common policy and iii) the inability of the third parties to jeopardise the collusive outcome.[671] The wording of the Court is as follows:

"...three conditions are necessary for a finding of collective dominance as defined:

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[668] In this case a retaliation mechanism was not seen as a "necessary condition for collective dominance", Decker (2009), p. 60. Lexecon Competition Memo, The Airtours Case, 12 November 1999. It could be asked, whether tacit collusion can exist without collective dominance to exist.

[669] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 26.

[670] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 9; Overd (2002), pp. 375-377. The case has been described, among other things, being "of crucial importance". Haupt (2002), p. 434. It has also been stated that in relation to the doctrine of collective dominance the case is a distillation and summation of the status of the law established in Case T-102/96 *Gencor v Commission* and does not represent a radical development of the law. Nikpay and Houwen (2003), p. 193.

[671] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 311; Dethmers (2005), p. 641.

- First, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting a common policy. … There must, therefore, be sufficient market transparency for all members of the dominant oligopoly to be aware, sufficiently precisely and quickly, of the may in which the other members' market conduct is evolving.

- Second, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market. … The notion of retaliation is respect of conduct deviating from the common policy is thus inherent in this condition. … for a situation to collective dominance to be viable, there must be adequate deterrents to ensure that there is a long-term incentive in not departing from the common policy, which means that each member of the oligopoly must be aware that highly competitive action on its part designed to increase its market share would provoke identical action by others … .

- Third, … the Commission must also establish that the foreseeable reaction of current and future competitors, as well as of consumers, would not jeopardise the result expected from the common policy."[672]

The Court did not refer to these conditions as the three necessary and together *sufficient* conditions for establishing collective dominance. The decision regarding the appeal did not require that. Instead, the Court stated that the Commission's decision had provided an insufficient factual basis to establish the three necessary conditions.[673]

The criteria established in the *Airtours v Commission* case were further elaborated in the EU Horizontal Merger Guidelines. The Guidelines provide an additional element as a starting point for the analysis: the ability of the members of an oligopoly to reach common understanding on the terms of coordination. This additional element can be considered as a fourth condition necessary for the establishment of coordination. Below, the criteria are discussed in more detail.

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[672] Case T-342/99 *Airtours v Commission*, para. 62.

[673] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 30.

4.6.2 Ability to Monitor

The EU Horizontal Merger Guidelines recognize that coordinating firms are often tempted to increase their market share by deviating from the terms of coordinating. Deviation may consist, for example, of lowering prices, offering secret discounts, increasing product quality or capacity or trying to win new customers. Only the credible threat of timely and sufficient retaliation keeps the firms from deviating.[674]

It is not sufficient that each member of an oligopoly is aware that coordination is profitable for all members of an oligopoly. Each member must also have a means of knowing whether others are adopting the same strategy and whether they are maintaining it.[675] Hence, markets need to be sufficiently transparent to allow coordinating firms to monitor to a sufficient degree whether others are deviating [676] and thus know when to retaliate. [677] Transparency helps the members of an oligopoly to detect deviation instantaneously or very quickly.[678] The level of transparency depends, for example, on the number of suppliers in the market and the way transactions take place in the market. Transparency is likely to be high in a market where the number of suppliers is low or transactions take place on a public exchange or in an open outcry auction.[679]

The EU Horizontal Merger Guidelines state that when evaluating the level of transparency in the market, the key element is to identify what firms can infer about the actions of other firms from the available information.[680] A precondition for coordination is that firms are able to interpret with some certainty whether unexpected behaviour is the result of deviation from the terms of coordination.

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[674] EU Horizontal Merger Guidelines, para. 49.

[675] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 30.

[676] EU Horizontal Merger Guidelines, para. 49; OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 30.

[677] EU Horizontal Merger Guidelines, para. 49.

[678] Drauz (2000), p. 2.

[679] See also Case IV/M.1313 – *Danish Crown/Vestjyske Slagterier*, paras. 176-179. The EU Horizontal Merger Guidelines, para. 50. As regards bidding markets, the degree of transparency depends on the type of auction method that is applied. In sealed bid auctions, no bidder may obtain access to information regarding the offers submitted by other bidders. In an open outcry auction, bidding behaviour by one bidder is readily observable by the other bidders. Conversely, transparency may be low in a market where transactions are confidentially negotiated between buyers and sellers on a bilateral basis. See, e.g. Case COMP/M.2640 - *Nestlé/Schöller*, para. 37; Case COMP/M.1225 – *Enso/Stora*, paras 67-68. The EU Horizontal Merger Guidelines, para. 50.

[680] Case IV/M.1939 – *Rexam (PLM)/American National Can*, para. 24.

In unstable environments it may be difficult for a firm to know whether the lost sales are due to an overall low level of demand or due to a competitor offering particularly low prices. Similarly, when overall demand or cost conditions fluctuate, it may be difficult to interpret whether a competitor is lowering its price because it expects the coordinated prices to fall or because it is deviating.[681]

The market does not have to be transparent in all respects but in key competition parameters such as price and quantities. In many cases the Commission has identified the existence of "feedback mechanisms" which provide information on the actions of other members of an oligopoly. These feedback mechanisms may consist, for example, of a meeting-competition clause and the existence of price lists or price quotations.[682] In the *Airtours/First Choice* case, prices and decisions were available to competitors.

In line with the economic theory, the EU Horizontal Merger Guidelines state that where monitoring of deviations is difficult, firms may engage in practices which have the effect of easing the monitoring, without being the objective of these practices. These practices may consist, for example, of the above-mentioned meeting-competition clause or most-favoured-customer clauses, voluntary publication of information, announcements or exchange of information through trade associations. The practices increase transparency or help firms interpret each other's choices. Cross-directorships, participation in joint ventures and similar arrangements may also make monitoring easier.[683]

4.6.3 Deterrent Mechanism

Coordination must be sustainable over time. Hence, there must be an incentive not to depart from the common policy on the market. Only if all the members of an oligopoly maintain parallel conduct can they all benefit.[684] According to the EU Horizontal Merger Guidelines, coordination is sustainable only if the consequences of deviation are sufficiently severe to convince all coordinating firms that it would be in their best interest to adhere to the terms of coordination. The threat of future retaliation keeps coordination sustainable.[685] The Court of

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[681] EU Horizontal Merger Guidelines, para. 50.

[682] See, e.g. Case IV/M.1313 - *Danish Crown/Vestjyske Slagterier*.

[683] EU Horizontal Merger Guidelines, para. 51.

[684] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5p. 30.

[685] See Case COMP/M.2389 – *Shell/DEA*, para. 121, and Case COMP/M.2533 – *BP/E.ON*, para. 111 in the EU Horizontal Merger Guidelines, para. 52. See also OECD

First Instance stated in the *Gencor v Commission* case that for a situation of collective dominance to be viable, there must be adequate deterrents to ensure that there is a long-term incentive in not departing from the common policy. Hence, each member of an oligopoly must be aware that highly competitive action in order to increase market share would provoke identical action by the others, so that it would not derive any benefit from its initiative.[686] However, the threat is only credible if where deviation is detected there is sufficient certainty that some deterrent mechanism will be activated.[687]

It is required that "there is some form of credible deterrent mechanism that can be activated if deviation is detected." The notion of "some form" indicates that the Commission is not bound only to certain types of retaliation mechanisms but that the retaliation may vary in different markets. As regards the forms of retaliation, the EU Horizontal Merger Guidelines provide as an example a price war or a significant increase in output.[688] The retaliation can consist, for example, of cancellation of joint ventures or other forms of cooperation or selling of shares in jointly owned companies.[689] Even if the deterrent mechanism is sometimes termed a 'punishment mechanism' it does not necessarily punish individually a firm that has deviated.[690] The Commission does not have to establish a specific retaliation mechanism. However, there must be adequate deterrents to dissuade the members of an oligopoly from deviating from the parallel behaviour.[691] The expectation that coordination may break down for a certain period of time if a deviation is identified, may in itself constitute a sufficient deterrent mechanism.[692]

According to the EU Horizontal Merger Guidelines, retaliation that manifests itself after some significant time period, or is not certain to be activated, is less likely to be sufficient to offset the benefits from deviating. For example, if a market is characterised by infrequent, large-volume orders, it may be difficult to establish a sufficiently severe deterrent mechanism, since the gain from deviating at the right time may be large, certain and immediate, whereas the losses from

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Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 30.

[686] See Case T-102/96 *Gencor v Commission*, para. 276.

[687] EU Horizontal Merger Guidelines, para. 52.

[688] EU Horizontal Merger Guidelines, para. 54.

[689] EU Horizontal Merger Guidelines, para. 55.

[690] EU Horizontal Merger Guidelines, para. 52.

[691] Dethmers (2005), p. 639.

[692] EU Horizontal Merger Guidelines, para. 52. However, the Draft EU Horizontal Merger Guidelines stated in para. 61 that this mechanism may not be sufficient to discipline tacit coordination, in which case other mechanisms may have to be involved.

being punished may be small and uncertain and only materialise after some time. A firm would only deviate from the coordinated practice if the rewards from deviating are larger than the cost of the punishment.[693] The speed with which deterrent mechanisms can be implemented is related to the issue of transparency. If firms are only able to observe their competitors' actions after a substantial delay, then retaliation will be similarly delayed and this may influence whether it is sufficient to deter deviation.[694]

The Guidelines further state that the credibility of the deterrence mechanism depends on whether the other coordinating firms have an incentive to retaliate. Some deterrent mechanisms, such as punishing the deviator by temporarily engaging in a price war or increasing output significantly, may entail a short-term economic loss for the firms carrying out the retaliation. This does not necessarily remove the incentive to retaliate since the short-term loss may be smaller than the long-term benefit of retaliating resulting from the return to coordination.[695]

The sooner the punishment is likely to be implemented, the smaller is the gain from deviation, and the larger is the loss incurred during punishment. The punishment mechanism may not be credible if, for example, capacity increases take place in big chunks such as building a new factory and where capacity has value only in this particular market. Coordination that aims at keeping total capacity below the competitive level may be unlikely, because there is no credible deterrent mechanism if a member of the oligopoly deviates by increasing capacity to a level where further increase would lead to a permanent oversupply.[696]

Retaliation need not necessarily take place in the same market as the deviation. [697] Commercial interaction in other market, may offer different methods of retaliation. [698] The members of an oligopoly can only base coordination on a deterrent mechanism if it would be rational for each member to carry it out once a hypothetical deviation occurs.[699]

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[693] A deviation would initially lead to a higher profit, but later on to a lower level of profit once the other members of an oligopoly would implement the punishment. Deviations are prevented when the loss of future profit during punishment outweighs the higher profit that is enjoyed during the period of deviation.

[694] EU Horizontal Merger Guidelines, para. 53.

[695] EU Horizontal Merger Guidelines, para. 54.

[696] EU Horizontal Merger Guidelines, paras 52-55.

[697] See, e.g. Case IV/M.1313 – *Danish Crown/Vestjyske Slagterier*, para. 177.

[698] See Case T-102/96 *Gencor v. Commission*, para. 281; See also the EU Horizontal Merger Guidelines, para. 55.

[699] EU Horizontal Merger Guidelines, para. 54.

Whether the member of an oligopoly would indeed implement a deterrent mechanism depends on a balancing of short-term and long-term consequences similar to those carried out by the potential deviator. If a deviation is not punished, coordination will break down and future profit levels will likely be low. If the punishment is executed, coordination may be restored, thus leading to higher profits in the future. It can thus be rational to implement a punishment mechanism even if it entails some short-term costs for the members of an oligopoly as long as they are outweighed by the long-term increase in profits that the restoring coordination would bring about.[700] Deviation may in itself bring about durable competitive advantages that no punishment available to the other members of an oligopoly could effectively counter. In a market with strong network effects,[701] the deviation may bring about an irrevocable shift in the competitive balance in the market that would leave the other competitors permanently behind.[702]

The merger may bring about changes as to how severe the punishment can be. This could, for example, result from changes in the distribution of market shares or excess capacity. The Commission will pay particular attention to such changes in the analysis of the competitive effects of the merger.[703] In EU case practice, the absence of a credible retaliation mechanism is a major determinant of the conclusion that the coordination among the members of an oligopoly is unlikely.

4.6.4 Inability of Third Parties to Jeopardise Collusive Outcome

Successful coordination requires that the expected outcome from coordination will not be jeopardised by the actions of non-coordinating firms and potential competitors, as well as customers.[704] For example, if coordination aims at reducing overall capacity in the market, this will only hurt consumers if non-coordinating firms are unable or have no incentive to respond to this decrease by increasing their own capacity sufficiently to prevent a net decrease in capacity, or at least to render the coordinated capacity decrease unprofitable.[705] The Commission has stated that the absence of competitive constraints from actual

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[700] EU Horizontal Merger Guidelines, para. 54.

[701] In markets with network effects a consumer prefers to be supplied by the same supplier as the other consumers. The EU Horizontal Merger Guidelines, para 72.

[702] EU Horizontal Merger Guidelines, paras 52-55.

[703] EU Horizontal Merger Guidelines, para. 52-55.

[704] EU Horizontal Merger Guidelines, para. 56; OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 30.

[705] EU Horizontal Merger Guidelines, para. 56. These elements are analysed in a similar way to non-coordinated effects.

competitors is a key factor in examining whether parallel behaviour can be sustained.[706] Special consideration is given to the possible impact of entry and countervailing buyer power of customers on the stability of coordination. For instance, by concentrating a larger amount of its requirement with one supplier or by offering long-term contracts, a large buyer can make coordination unstable by successfully tempting one of the coordinating firms to deviate in order to gain substantial new business.[707] For example, in the *Gencor v Commission* case the Court of First Instance refer to the inability of actual and potential competitors and customers or consumers to react effectively. [708]

In certain cases, the Commission has concluded that in a market with three suppliers, the structure itself may not facilitate the development of anti-competitive parallel behaviour - even if the removal of one supplier was significant in qualitative terms - if other factors point to the opposite.[709] This can be the case, for example, if the other suppliers have spare capacity to expand production in the short term. Other factors which may affect to the analysis may consist factors such as the degree of vertical integration and the way contracts are negotiated.

In the *Gencor v Commission* case, the Court specified a method applying the concept of a collective dominant position that effectively equates with coordinated interaction addressed by the SLC test applied, for example, in US merger control.[710] As regards the concept of a collective dominant position, the following part of the judgment is particularly pertinent:[711]

"A collective dominant position significantly impeding effective competition in the common market or a substantial part of it may … arise as the result of a concentration where, in view of the actual characteristics of the relevant market and of the alteration in its structure that the transaction would entail, the latter would make each member of the dominant oligopoly, as it becomes aware of common interests, consider it possible, economically rational, and hence preferable, to adopt on a lasting basis a common policy on the market with the

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[706] See e.g. Case COMP/M.1741 - *MCI WorldCom/Sprint*, paras 257-302. See also the Guidelines for Electric Communications, para. 103.

[707] EU Horizontal Merger Guidelines, para. 57.

[708] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 29.

[709] See, e.g. Case IV/M.390 - *Akzo/Nobel Industrier*.

[710] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 29.

[711] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 29

aim of selling at above competitive prices, without having to enter into an agreement or resort to a concerted practice within the meaning of Article 81 EC (currently Article 102 TFEU)[712] and without any actual or potential competitors, let alone customers or consumers, being able to react effectively."[713]

The Commission has stated that the Court advanced formal criteria for establishing tacit coordination.[714] In collusive oligopolies, it is considered whether the increase of post-merger prices above competitive levels is the result of tacit collusion between the members of an oligopoly, i.e. the "coordinated effects" doctrine.[715]

4.7 Stabilisation of Assessment Criteria

4.7.1 Necessary Conditions for Coordination and Mechanism of Hypothetical Tacit Coordination in *Sony/BMG v Impala* Case

In the *Sony/BMG*[716] case the Commission initially assessed that the merger would result in coordinated effects, but finally cleared the merger without conditions. The Commission argued in the Statement of Objection (hereinafter the SO) that the merger would reinforce a collective dominant position on the market for music recording between so-called music majors, i.e. the merged entity Sony-BMG and Universal, Warner and EMI. The Commission based its assessment on factors such as concentrated market structure, relative homogeneity of products in terms of format and relative transparency of list prices, the so-called published prices for dealers (hereinafter PPDs) which facilitated price coordination.[717]

The Commission also carried out quantitative analysis and investigated the monthly net average wholesale prices charged by the music majors for their 100 best-selling albums between 1998-2003 in France, Germany, Italy, Spain and the United Kingdom. The Commission found that previous net average wholesale

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[712] For that effect, see e.g. Case T-102/96 *Gencor v Commission*, para. 227.

[713] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 29.

[714] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 328.

[715] OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers, DAFFE/COMP(2003)5, p. 312.

[716] Case COMP/M.3333 – *Sony/BMG*.

[717] Luebking and Ohrlander (2009), p. 68; Kokkoris (2011), pp. 129-139.

prices followed very similar trends. The parties replied to the SO and presented voluminous pricing data. The Commission found in its decision that average wholesale price trends were not a decisive indicator of past coordination and some deviations had existed. Pricing was also found to be transparent only to a certain extent due to unpublished discounts, in particular campaign discounts to the PPDs.[718] Hence, the Commission assessed potential variations in discounts on price and as these varied to a certain extent, the Commission concluded that the indications of coordinated behaviour were not sufficient to establish a collective dominant position. The Commission thus concluded that the merger would not lead to competition concerns and cleared the merger.[719]

The Commission's decision was appealed by an association of independent music publishers, Impala, to the Court of First Instance. In the *Impala v Commission* case, the Court annulled the Commission's decision.[720] Followed by arguments made by Impala, the Court stated that the Commission had manifestly erred by placing undue reliance on campaign discounts. The Court stated that the discounts were relatively stable, were monitored by the industry and were of limited importance to overall pricing levels. The Court also criticised the pricing evidence that the Commission had been relied on to reject the risk of coordinated effects and stated that the pricing of music majors was governed by a finite number of "rules of thumb".[721]

The *Impala v Commission* case was considered a surprising development.[722] The Court stated that "it follows from the case-law that in order for a situation of collusive dominant position to be viable, there must be adequate deterrents to ensure that there is a long-term incentive in not departing from the common policy".[723] The parties, supported by the Commission, appealed the judgment the Court of Justice.

In the *Sony/BMG v Impala* case,[724] the Court of Justice annulled the judgment of the Court of First Instance and set out the principles which should guide the analysis concerning the possibility of coordinated outcome. The Court discussed a number of characteristics of the market such as market concentration, transparency and product homogeneity. The Court stated that in addition to the

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[718] Luebking and Ohrlander (2009), p. 68.
[719] Dethmers (2005), p. 645.
[720] Case T-464/04 *Impala v Commission*. See also Whish and Bailey (2012), pp. 872-873.
[721] Luebking and Ohrlander (2009), p. 68.
[722] Amelio et al. (2009), p. 92.
[723] Case T-464/04 *Impala v Commission*, para 465.
[724] Case C-413/06 *Sony/BMG v Impala*; Amelio et al. (2009), p. 92.

general framework for analysing the likelihood of tacit collusion, such collusion may arise where, in view of the actual characteristics of the relevant markets, each member of an oligopoly would become aware of common interest and consider it preferable to adopt on a lasting basis a common policy with the aim of selling at price above the competitive level.[725] The Court stated that such an outcome is more likely to occur where the competitors can reach a common understanding of how the coordination should work and where the coordination is sustainable. As regards the sustainability of coordination, the Court referred to three necessary conditions, i.e. the ability to monitor whether the terms of coordination are adhered to, which requires a sufficient transparency of the market, credible deterrent mechanisms and the inability of the reactions of customers and future competitors to jeopardise the expected results of coordination. The Court explicitly stated that these criteria are not incompatible with the criteria established in the *Airtours v Commission* judgment.[726]

However, the Court of Justice stated that in applying these criteria it is necessary to avoid a mechanical approach involving a separate verification of each of the criteria taken in isolation, while taking no account of the overall economic mechanism of a hypothetical tacit coordination. The Court concluded that the assessment of transparency cannot be undertaken in isolation and in an abstract manner. Instead, the assessment must be carried out using the mechanism of a hypothetical tacit coordination. This would ascertain whether any elements of transparency are capable of facilitating the reaching of common understanding on the terms of coordination and to monitor whether the terms are being adhered to. The Court of Justice found that the Court of First Instance had failed to respect these principles when analysing plausible coordination strategies. In particular, the Court of First Instance had not properly assessed whether the price discount variations could call into question the possibilities of adequate monitoring of mutual compliance.[727]

The Court thus endorsed an economic model of tacit coordination and elaborated elements that the Commission should assess.[728] The Court stated that tacit coordination "is likely to emerge if competitors can easily arrive at common perception as to how the coordination should work".[729] However, tacit

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[725] Luebking and Ohrlander (2009), p. 70-71.
[726] Case C-413/06 *Sony/BMG v Impala*, paras 123-124; Luebking and Ohrlander (2009), p. 71; Amelio et al. (2009), p. 93.
[727] Case C-413/06 *Sony/BMG v Impala*, para 126; Luebking and Ohrlander (2009), p. 71.
[728] Amelio et al. (2009), p. 92.
[729] Case C-413/06 *Sony/BMG v Impala,* para. 123; Amelio et al. (2009), p. 93.

coordination is difficult to prove and can rarely be proven by hard evidence.[730] Tacit coordination can arguably be observed from the conduct of firms and interpreting it correctly in the light of existing market conditions.[731] The Court also requires the Commission to link the criteria to the effects of a merger. The merger may significantly impede effective competition "by increasing the likelihood that firms are able to coordinate their behaviour" or "by making coordination easier, more stable or more effective".[732]

Even if the Court of Justice stated that the criteria analysed in this case are not incompatible with the *Airtours v Commission* case, it has been argued that the Court substantially endorsed the test set in the *Airtours v Commission* case. The Court of Justice manifested that coordinated effects must be built on a clear conceptual framework, starting from a hypothetical tacit coordination. This arguably means that each member of the oligopoly considers it "possible, economically rational, and hence preferable, to adopt on a lasting basis a common policy on the market with the aim of selling at above competitive prices". The general methodology set out by the Court gives broad discretion to the Commission in assessing the likelihood of a coordinated outcome.[733]

4.7.2 Confirmation of Mechanism of Hypothetical Tacit Coordination in *ABF/GBI Business* Case

The *ABF/GBI Business* case was the first case since the *Airtours v Commission* case in which the Commission intervened solely on the basis of coordinated effects.[734] It was also the first example of the shift towards the SIEC test in the Merger Regulation and closer to economic analysis.[735] In this case, economic analysis consisted of the analysis of transaction data and it supplemented the qualitative analysis. However, there was no need for extensive econometric evidence.[736]

The case concerned the acquisition of the GBI yeast business in continental Europe by Associated British Foods (hereinafter ABF). The remaining part of GBI was sold by the Dutch private equity firm Gilde to the French company Lesaffre,

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[730] Amelio et al. (2009), p. 92.
[731] Amelio et al. (2009), p. 93.
[732] Amelio et al. (2009), p. 93.
[733] Luebking and Ohrlander (2009), p. 72
[734] Amelio et al. (2009), p. 91.
[735] Amelio et al. (2009), p. 93.
[736] Amelio et al. (2009), p. 94.

another leading yeast producer.[737] The case was referred to the Commission by Spain, Portugal and France under Article 22 of the Merger Regulation. After an in-depth investigation, the Commission identified competition concerns on the national markets for compressed yeast in Spain and Portugal. Prior to the merger, ABF had a market share of 30-40% and GBI 10-20 % on the compressed yeast market in Spain, whereas Lesaffre had 40-50%. In Portugal, GBI had a market share of 40-50% and ABF 20-30% of the market for compressed yeast, whereas Lesaffre had 20-30%. In both Spain and Portugal, other competitors were fringe players.[738]

In this case the Commission focused on understanding the dynamics of the industry at the level of the yeast market and at the distribution level. The Commission took into account factors such as the small number of suppliers in the market, high frequency of repeated interaction of suppliers, relatively stable market, low elasticity of demand, product homogeneity, high degree of market transparency, high barriers to entry, low buyer power and extensive multi-market contacts.[739] The likelihood of coordination was also increased by the mutual interdependence of the members of an oligopoly, the interplay between Portuguese and Spanish markets, the collusive price leadership which was followed by other players[740] and the symmetry of spare capacities.[741] The removal of GBI from the market would also eliminate a potentially destabilizing factor in the collusive game.[742]

In this case local distributors had an important role in implementing and monitoring the collusive mechanism.[743] The market for compressed yeast in Portugal and Spain essentially consisted of artisan bakers, i.e. small family enterprises. Compressed yeast had to be served to these customers by local/regional distributors on a nearly continuous basis. The Commission's investigation revealed the importance and the stability of the relationship between distributors and their customers.[744] Distributors collected information about the market at the distribution level and reported the information back to

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[737] The transaction was notified under Case COMP/M.5020 – *Lesaffre/GBI UK*. The transaction was cleared subject to commitments in the Phase I. Amelio et al. (2009), p. 91.

[738] Case COMP/M.4980 – *ABF/GBI Business*, paras 385-389; Amelio et al. (2009), p. 91.

[739] Case COMP/M.4980 – *ABF/GBI Business*, paras 147-205; Amelio et al. (2009), p. 94.

[740] Amelio et al. (2009), p. 95.

[741] Amelio et al. (2009), p. 96.

[742] Amelio et al. (2009), pp. 95-96.

[743] Amelio et al. (2009), p. 94.

[744] Case COMP/M4980 – *ABF/GBI Business*, paras 58-68; Amelio et al. (2009), pp. 94-95.

the suppliers, which caused significant market transparency. The transparency provided the three main suppliers with the ability to monitor any deviation in prices or other conditions and, hence, facilitated the sustainability of coordination.[745]

The Commission also analysed how coordination would actually work in practice. This would mean understanding the mechanism and variables on which the suppliers would tacitly coordinate their actions, the mechanisms for detecting deviations and the retaliation. In this context, the Commission refers to coordination mechanism. The Commission analysis showed that due to the fact that the market was transparent the competitors would be able to arrive at a common perception of each other's behaviour. Some evidence showed that price increases would be anticipated. Simultaneous price increases were found to be focal point of collusion. As regards deterrent mechanism, the Commission stated that significant excess capacity provided the three main players in the market, i.e. Lesaffre, ABF and GBI with a position to react promptly to punish deviations.[746]

The Commission's investigation revealed that there was a certain degree of coordinated behaviour in the markets already prior to the merger. Hence, the Commission focused on whether the merger would make the coordination more effective or more stable. The Commission concluded that the three-to-two merger would significantly change the market. The merger would enhance the possibility of reaching terms of tacit agreement, enhance market transparency and monitoring as well as the deterrent mechanism.[747] The merger was cleared subject to the remedies proposed by the parties.[748] These remedies consisted of divestitures.

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[745] Amelio et al. (2009), p. 95.
[746] Amelio et al. (2009), p. 94.
[747] Amelio et al. (2009), pp. 95-96.
[748] Amelio et al. (2009), p. 91.

5 ASSESSMENT OF OLIGOPOLIES

5.1 Introduction

This chapter discusses the substantive assessment criteria according to which coordinated effects are assessed in Finnish merger control. The chapter describes how the development in EU merger control has affected the development of the merger assessment regarding oligopolistic markets in Finland. The focus is on the assessment criteria and the development of the said criteria. The assessment criteria are examined by studying the merger control provisions, preparatory legislative works, merger guidelines and case practice.

As the cases discussed in the study were mostly examined under the dominance test, the assessment criteria under the dominance test are of importance. The chapter also discusses how competition concerns identified in oligopolistic market have been addressed by remedies.

5.2 Substantive Test

In Finland, the substantive test for the assessment of the competitive effects of a merger, i.e. the SIEC test, is provided in Section 25 of the Competition Act. The test is identical to the substantive test applied in the EU and it measures whether the merger would significantly impede effective competition, in the Finnish markets or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position. The effects that change of the dominance test into the SIEC test would bring about the discussion focused on unilateral effects and closure of the alleged gap. As regards coordinated effects, the change was considered to be less significant. However, the SIEC test would provide a flexible vehicle for capturing coordinated effects, as the construction of a collective dominant position would no longer be required. Coordinated effects could also be captured at an early stage.

Until the adoption of the Competition Act in 2011, Finnish merger control was based on the dominance test. The dominance test was provided in Article 11d of the Act on Competition Restrictions, a predecessor of the Competition Act. Under the dominance test, the FCA had to establish whether the merger would create or strengthen a dominant position as a result of which competition would be significantly impeded. The FCA could only intervene a merger in oligopolistic

markets if it would result in collective dominance. A presumption was that collective dominance would cause similar competition concerns as single firm dominance.[749] The dominance test, however, would not catch unilateral effects where a merger would eliminate important competitive constraints that the merging parties previously exerted upon each other together with the reduction of competitive pressure on the remaining competitors.

Under the dominance test, the first condition was whether the proposed merger would create or strengthen a dominant position.[750] This was also described as the "key test" for the appraisal of merger.[751] The starting point for the appraisal was a single dominant position. If such a position was not created or strengthened, an appraisal as to whether the merger would lead to the creation or strengthening of a collective dominant position was carried out.[752] While assessing a collective dominant position, the FCA assessed whether the members of an oligopoly would have the ability and incentive to jointly increase price. Coordination must also be likely and sustainable.

5.3 Anti-competitive Effects in Oligopolistic Markets

As stated in the previous chapters, anti-competitive effects can be categorized into two general groups: non-coordinated effects, also termed unilateral effects, and coordinated effects. This categorization is also applied in the Finnish Merger Guidelines and the definition of these effects is the same as in the EU Horizontal Merger Guidelines.

Coordinated effects refer to the actions of firms that would be profitable only if they are accompanied by the actions of others, i.e. accommodating reactions. The Finnish Merger Guidelines state that changes brought about by mergers in competitive dynamics significantly impede effective competition by increasing the likelihood of previously independent firms beginning to coordinate their behaviour in order to raise prices. Mergers can also make coordination easier, more stable, or more effective for firms which were already coordinating before the merger. Coordinated effects are more likely to emerge in highly-concentrated oligopolistic markets where two or more firms consider it possible and

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[749] See, e.g. *Fritidsresor/Finnmatkat*, Case No. 1976/81/99.
[750] Fine (1991), pp. 148-149.
[751] See the Commission Press Release, "The Commission prohibits GE's acquisition of Honeywell", IP/01/939, 3 July 2001.
[752] Hautala (2002), p. 45.

economically rational to coordinate their behaviour.[753] As regards cases discussed in this study, coordinated effects are also referred to as a collective dominant position as they are assessed under the dominance test.

Non-coordinated effects refer to the ability of a firm to unilaterally increase prices. The Finnish Merger Guidelines state that changes resulting from a merger can significantly impede effective competition in a market by resulting in non-coordinated effects. Mergers can remove, or reduce, important competitive constraints on one or more firms, and therefore result in significant impediment to effective competition without firms expressly, or even tacitly, coordinating their operations. This is usually caused by a loss of competition between the merging parties which therefore eliminate the competitive pressure between them and allow the merging parties to profitably increase prices.[754] Non-coordinated effects are likely to result, for example, if the merging parties have large market shares, market shares have remained relatively stable, there are only a few notable competitors, the merging parties are close competitors, customers have limited switching possibilities and competitors have limited possibilities to react promptly to price increases.[755]

A merger which results in competition concerns cannot proceed without an intervention but the identified competition concerns must be addressed by adequate remedies. If this is not possible, a merger has to be prohibited. The FCCA cannot prohibit an anti-competitive merger but it has to make a proposal to the Market Court to prohibit it. According to Section 25 of the Competition Act, the Market Court may, upon the proposal of the FCCA, prohibit a merger, order a merger to be dissolved, or attach conditions on the implementation of a merger, if the merger would significantly impede effective competition. Section 25 further states that if the impediment of competition can be avoided by attaching conditions, instead of making a proposal, the FCCA will negotiate and order such conditions to be applied. In practice, the FCCA identifies competition concerns and the merging parties propose remedies which adequately address these concerns. The FCCA cannot impose remedies which are not approved the notifying parties. Remedies are usually proposed by one of the notifying parties, but can also be proposed by both parties. In certain rare cases, remedies can be imposed on third parties. The FCCA also market tests the proposed remedies before they are imposed.[756]

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[753] Finnish Merger Guidelines, p. 76.
[754] Finnish Merger Guidelines, p. 73.
[755] Finnish Merger Guidelines, p. 74.
[756] Finnish Merger Guidelines, p. 97.

If the parties do not propose adequate remedies, the FCCA has no other option than to propose the Market Court to prohibit a merger. Section 25 of the Competition Act does not clearly state whether the Market Court may impose remedies that are not approved by the notifying party. It should also be noted that the Market Court does not necessarily market test remedies. Therefore, it may not always be clear from case law how the Court ended up imposing certain types of remedies in an individual case and how the remedies imposed addressed the competition concerns identified.

The FCCA, similarly to the FCA, usually prefers structural remedies over behavioural ones.[757] This is also explicitly stated, for example, in the *NCC/Destia* case. With regard to the merger cases in oligopolistic markets, remedies have mainly consisted of the removal of links between the members of an oligopoly, the divestiture of an interest in a competitor, reduction of market transparency, weakening of the punishment mechanism and improving market entry. The transparency of the market may, for example, be addressed by eliminating the possibility of the exchange of information.

5.4 Assessment of Coordinated Effects

5.4.1 Guidance Provided by Preparatory Legislative Works

The Act on Competition Restrictions did not - similarly to that of the Competition Act - provide any statutory criteria according to which mergers should be assessed. The Government Bill of 1997 for the Act on Competition Restrictions stated that while assessing the competitive effects of a merger the FCA must take into account, for example, the following factors: actual or potential competition from undertakings located either within or outside Finland, the structure of the markets, the market position of the merging parties and their economic and financial power, the alternatives available to suppliers and users and buyer power, legal and economic barriers to entry, supply and demand trends for the relevant goods and services, the position of the intermediate and ultimate customers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.[758] The factors are similar to those provided in Article 2(1) of the

[757] Finnish Merger Guidelines (2011), p. 98; Leivo et al (2011), p. 1408.
[758] See Government Bill of 1997 for the Act on Competition Restrictions, p.23.

Merger Regulation and they are common both to the assessment of single dominance and collective dominance.

5.4.2 Guidance Provided by Finnish Merger Guidelines

As regards the assessment criteria, the Finnish Merger Guidelines provide general assessment criteria which are similar those in Article 2(1) of the Merger Regulation and which relate, among others, to the structure of the markets, the position of the merging parties as well as the positions of competitors and customers. The criteria were listed in the above-mentioned Government Bill of 1997 for the Act on Competition Restrictions and were repeated in the Government Bill of 2010 for the Competition Act.

In addition to the general assessment criteria, the Finnish Merger Guidelines state, similarly to the EU Horizontal Merger Guidelines and in line with the approach suggested by the economic literature, that the FCCA would examine "whether it would be possible to reach the terms of coordination and whether the coordination is likely to be sustainable".[759] The Finnish Merger Guidelines further state that "three conditions are usually *necessary* for coordination to be considered possible or more likely".[760] As with the EU Horizontal Merger Guidelines, the conditions refer to the criteria provided in the *Airtours v Commission* judgment. However, it should be noted that the Finnish language version of the Guidelines is slightly different from the English version, as the Finnish version of the above-mentioned sentence which refers to the three conditions states that "for coordination to be successful or more likely the following is usually presumed". In practice, there might not be any difference between conditions which are necessary compared to those which are presumed.

There are also certain differences between the Finnish Merger Guidelines and the EU Horizontal Merger Guidelines with regard to the categorization of necessary conditions. The Finnish Merger Guidelines, unlike the EU Horizontal Merger Guidelines, combine the possibility to reach the terms of coordination – articulated in the Finnish Merger Guidelines as the possibility to "easily arrive at a common perception as to how coordination should work" – and the ability to monitor as a single combined condition, forming thus the first condition for coordinated effects. The second condition, similar to the EU Horizontal Merger Guidelines, consists of deterrent mechanism. The third condition, also similar to

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[759] Finnish Merger Guidelines, p. 76; EU Horizontal Merger Guidelines, para. 42.

[760] Finnish Merger Guidelines, p. 76. See the Finnish language version of the Guidelines, p. 76.

the EU Horizontal Merger Guidelines, refers to the inability of third parties to jeopardise the collusive outcome.[761] As regards all these conditions, the Finnish Merger Guidelines refer to the sustainability criterion. However, as regards the second condition, i.e. the deterrent mechanism, the Finnish language version of the Guidelines does not refer to the sustainability criterion, but states that "coordinating firms have to possesses sufficient deterrent mechanisms to convince that it is in their best interest to adhere the terms of coordination".[762]

As regards the first condition, i.e. the combined condition of the possibility to reach the terms of coordination and the ability to monitor, the Finnish Merger Guidelines state that "coordination is usually more likely to emerge if competitors can easily arrive at a common perception as to how coordination should work." According to the Guidelines, the FCCA considers factors such as market transparency, any structural links between the firms such as cross-shareholding or participation in joint ventures, the symmetry of firms with regard to market share and cost structures, product homogeneity and stability of the economic environment.[763] As regards the first condition, the Guidelines state further that "in order for coordination to be sustainable, the coordinating undertakings need to be able to monitor to a sufficient degree whether the terms of coordination are being adhered to". This usually requires market transparency.[764] It could be asked whether the fact that the possibility to reach the terms of coordination is explicitly considered as a necessary condition in Finland raises the level of proof compared to the level in the EU. In the EU, the ability to reach the terms of coordination is not one of the original three necessary conditions established in the *Airtours v Commisison* case, but is considered to form a type of fourth condition, as stated, for example, in the EU Horizontal Merger Guidelines.

As regards the second condition, the Guidelines state that "discipline requires that there is some form of credible deterrent mechanism that can be activated if deviation is detected". The Guidelines state further that deterrent mechanisms have to be credible, timely and sufficiently severe. The deterrent mechanism may consist, for example, of severe price cuts, output increases or cancellation of joint

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[761] Finnish Merger Guidelines, pp. 76-77.

[762] See the Finnish language version of the Guidelines, p. 77.

[763] Finnish Merger Guidelines, p. 76; EU Horizontal Merger Guidelines, paras. 44-45, 48-49. The First Finnish Merger Guidelines stated that cross ownership and contractual arrangements beyond the ordinary commercial agreements were strong indications of a collective dominant position. See the Guidelines, p. 36. See also, Jokinen (2002), pp. 53-54. The same statement is provided in *Fritidsresor/Finnmatkat*, Case No.1076/81/99.

[764] Finnish Merger Guidelines, p. 77.

ventures.[765] As regards the third condition, the Guidelines state that "the reactions of outsiders, such as current and future competitors not participating in the coordination as well as customers, should not be able to jeopardise the results expected from the coordination".[766]

Finally, the Finnish Merger Guidelines state that a number of factors can increase the likelihood of coordination, or, if coordination takes place prior to the merger, making it easier or more stable. These factors consist, for example, of highly concentrated markets, symmetry of firms with regard to market shares and cost structures, homogenous products, market transparency and stable market shares.[767] A number of these factors are similar to factors that refer to the possibility to reach the terms of coordination.

The Guidelines acknowledge that the above-mentioned list is not exhaustive and that not all factors need to be present. In addition, taken separately these factors are not necessarily decisive. Hence, the Guidelines emphasise that the list forms examples of factors that the FCCA will take into account in its assessment.[768]

5.4.3 Development of Assessment in Finnish Case Practice

The FCA has assessed collective dominance under the dominance test, for example in the *Fritidsresor/Finnmatkat, Carlsberg/Orkla, Lännen Tehtaat/Avena* and *NCC/Destia* cases. In the *Lännen Tehtaat/Avena* case and in the *Fritidsresor/Finnmatkat* case, the FCA divided the assessment criteria into basic conditions and factors increasing the likelihood of coordination. In the *Carlsberg/Orkla* case, the FCA arguably applied a checklist approach. A recent case where coordinated effects were assessed is the *NCC/Destia* case, in which the FCA explicitly applied the criteria established in the *Airtours v Commission* case. The FCA's decision was appealed to the Market Court and the Court explicitly applied the same criteria. These cases illustrate the main development of assessment criteria in Finland.

In all the cases mentioned above, the FCA, and later the FCCA, initiated second phase proceedings and was concerned that the proposed mergers could create or strengthen collective dominance in the Finnish market. Apart from the *NCC/Destia* case, the FCA considered that the commitments proposed by the

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[765] Finnish Merger Guidelines, p. 77.
[766] Finnish Merger Guidelines, p. 77.
[767] Finnish Merger Guidelines, pp. 77-78.
[768] Finnish Merger Guidelines, p. 78.

notifying parties were adequate to address the competition concerns and cleared the mergers subject to these conditions. In the *NCC/Destia* case, the proposed commitments were not considered to be adequate and the FCCA made a proposal to the Market Court to prohibit the merger. The Market Court cleared the merger subject to conditions. Prior to the *NCC/Destia* case, the Competition Council had only discussed collective dominance in cases which concerned the abuse of a dominant position, such as the *Alfons Håkans and Finntugs*[769] and *Telia Finland/Sonera/Radiolinja*[770] cases.

In cases which were examined under the dominance test, the FCA stated that collective dominance typically relates to oligopolistic market structure where there are only a few large firms. Collective dominance may occur when the members of an oligopoly have the ability to reach common understanding and can maintain prices above the competitive level. Coordinated interaction does not need to be expressed explicitly nor based on agreements. Hence, the notion of collective dominance also covers tacit collusion.[771] Furthermore, the FCA has stated that a mere adaptation to market conditions may result in anti-competitive behaviour between the members of an oligopoly and create a collective dominant position.[772] However, in the *Alfons Håkans and Finntugs* case the Competition Council concluded that the fact that firms act in a uniform manner in oligopolistic markets is not sufficient, as cooperation must be conscious and planned. As stated on several occasions, assessment under the merger control provisions is different from assessment under the provisions that prohibit the abuse of a dominant position.

Under the dominance test, the assessment criteria for collective dominance were divided into basic conditions indicating the existence of collective dominance and factors increasing the likelihood of collective dominance.[773] The assessment criteria are somewhat similar to the criteria provided in the *Airtours v Commission* judgment and therewith aligned with the EU Horizontal Merger Guidelines.[774]

In Finnish merger control, basic conditions for collective dominance have consisted of the acknowledgment of mutual interdependence by the members of an oligopoly, high barriers to entry and the ability of the members of an oligopoly

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[769] *Alfons Håkans and Finntugs*, Case No. 23/359/98.
[770] *Telia Finland/Sonera/Radiolinja*, Case No. 22/690/2000.
[771] See, e.g. *Fritidsresor/Finnmatkat,* Case No. 1976/81/99.
[772] See, e.g. *Fritidsresor/Finnmatkat*, Case No. 1976/81/99.
[773] Jokinen (2002), p. 54.
[774] Some of the factors are also familiar from the US Horizontal Merger Guidelines.

to detect deviations from the common line of behaviour and to 'punish' such companies.[775] These basic conditions have similar elements to the necessary conditions for coordination even if they differ to some extent, from those in the *Airtours v Commission* case. For example, the inability of third parties to jeopardise the coordinated outcome, which is one the three necessary conditions in the *Airtours v Commission* case, is not explicitly referred to as a basic condition in the Finnish merger control. However, the FCCA and Market Court generally assess factors such as the ability of competitors to act as competitive constraints as well as the ability of customers to switch supplier and potential buyer power. Unlike the Commission, the FCA has also made reference to the cases of abuse of a dominant position when it has assessed collective dominance in merger cases.[776] Whether the guidance derived from the abuse of a dominant position cases have been relied on in merger cases has not been explicitly stated. Similar to the EU, the fact that the basic conditions are fulfilled is not sufficient to indicate the existence of collective dominance.[777] This means that something else needs to be proven.

The first basic condition consisted of the acknowledgment of mutual interdependence. The FCA has stated that collective dominance existed only if the members of an oligopoly could reach an 'understanding' and maintain prices above the competitive level. An interaction between firms may be expressed explicitly and can be based, for example, on agreements, i.e. explicit collusion.[778] An interaction between firms may also be expressed implicitly, i.e. tacit collusion. The acknowledgment of mutual interdependence is similar to the requirement of reaching a common understanding on the terms of coordination, which is applied in the EU.

A precondition for mutual interdependence is that there are only few suppliers in the market, with the effect that each provider must take into account the actions of others and foresee the likely reactions to its own measures. In case practice it has been sufficient that some of the major suppliers reach understanding,[779] i.e. not all the members of an oligopoly are required to reach a common understanding. The number of suppliers refers to the market concentration. Finnish merger control does not apply concentration ratios or HHI as in the EU.

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[775] Jokinen (2002), p. 54.

[776] The FCA has referred, e.g. to *Valio II*, Case No. 1/359/94*; Alfons Håkans and Finntugs*, Case No. 23/359/98 and *Telia Finland/Sonera/Radiolinja*, Case No. 22/690/2000.

[777] Jokinen (2002), p. 54.

[778] Jokinen (2002), p. 54.

[779] See *Fritidsresor/Finnmatkat*, Case No. 1976/81/99.

The FCCA assesses the market shares of the major firms in the market. In line with early cases in the EU, collective dominance has been established in a duopoly. The FCA has stated, for example, that without contrary evidence high market shares in a duopoly is a clear indication of collective dominance. The likelihood of coordination also increases, together with the symmetry of market shares.[780] The ability to reach a mutual interdependence among the members of an oligopoly increases, for example, by cooperation between the members of an oligopoly such as contract manufacturing and the homogeneity of product.

The second basic condition is high barriers to entry and expansion. Barriers to entry affect the likelihood and extent to which the threat of potential competition constrains the ability of the incumbents to act independently of other market participants.[781] If barriers to entry exist, the leading firms can raise prices, for example, by reducing output as they do not have to fear that potential entrants would bring additional supply to the market.[782]

Similar to the EU Horizontal Merger Guidelines, the Finnish Merger Guidelines divide barriers to entry into legal, economic and technical barriers. Legal barriers may consist of intellectual property rights, production quotas set by the public administration, licences and type approvals. Economic barriers may consist of the high costs of market entry and exit, in particular, compared to the expected revenues. An assumption is that entry is likely if the expected revenues are high. Economic barriers to entry may also consist of the threat to use excess capacity, lack of distribution channels and supply sources, strength of the incumbents' brands, cooperation between suppliers and customers and cross-ownerships. Technical barriers may consist of economies of scale and scope, production processes and innovations. An assumption is that barriers to entry are high if the volume needed to attain the economies of scope possessed by the incumbents is large. Technical barriers to entry may also consist of economies of scale possessed by conglomerates and vertically integrated firms. As regards vertically integrated firms, barriers to entry may result from the requirement of simultaneous entry to different market levels and from the fact that it may be disadvantageous to operate at only one level.[783]

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[780] See *Fritidsresor/Finnmatkat*, Case No. 1976/81/99.

[781] Finnish Merger Guidelines, p. 43. See also OECD Roundtable on Barriers to Entry, DAF/COMP(2005), p. 115.

[782] Jokinen (2002), p. 54. See, e.g. *Fritidsresor/Finnmatkat,* Case No. 1976/81/99.

[783] Finnish Merger Guidelines, p. 91. The same division was also applied in the first Finnish Merger Guidelines, p. 43; OECD Roundtable on Barriers to Entry, DAF/COMP(2005)42, 115.

Barriers to entry do not have to foreclose entry entirely. They may, as such, indicate the ability of incumbents to restrain entrants from achieving a market position that would be competitively significant. Entry costs prevent entry when they are significant and do not affect the behaviour of incumbents.[784] The level of barriers to entry varies within different markets and market phases. In some markets, a single factor, such as the lack of distribution channel, raw material, technology or strong brand can be decisive. The significance is assessed in the light of the previous entry and the market position the entrant has achieved.[785]

The third basic condition consists of the ability of the members of an oligopoly to detect deviations from the common line of behaviour and to 'punish' such companies.[786] The condition is similar to the conditions provided by Court of the First Instance in the *Airtours v Commission* case, i.e. the ability to monitor the behaviour of the members of an oligopoly and to retaliate. In its decision practice, the FCA has stated that market transparency and the simultaneous presence of firms in different markets leading to multi-market contacts provide the members of an oligopoly with the ability to detect deviations. The retaliation mechanism will consist of different types of arrangements and links between the members of an oligopoly. The FCA's early decisions did not explicitly refer to the ability of third parties to jeopardise the outcome of coordinated effects. However, the FCA has referred, for example, to the ability of potential competition to constrain the ability of incumbents to act independently from other market participants.

The FCA has explicitly stated that the fact that basic conditions are fulfilled is not sufficient to establish the existence of collective dominance. It has also assessed factors which are considered to increase the likelihood of collective dominance These factors consist, among others, of market transparency, barriers to entry, product homogeneity, stable market conditions, stagnant demand and limited buyer power.[787] In addition, links between the members of an oligopoly and the symmetry of market positions of firms have also been considered to increase the likelihood of collective dominance.

Market transparency facilitates the monitoring of price levels in the market. The Finnish Merger Guidelines state, for example, that cross-ownership between

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[784] Finnish Merger Guidelines, p. 93. See also the first Finnish Merger Guidelines, p. 43; OECD Roundtable on Barriers to Entry, DAF/COMP(2005)42, p. 115.

[785] Finnish Merger Guidelines, p. 93. See also the first Finnish Merger Guidelines, pp. 43-44; OECD Roundtable on Barriers to Entry, DAF/COMP(2005)42, p. 115.

[786] Jokinen (2002), p. 54.

[787] Jokinen (2002), p. 55.

firms and contractual arrangements beyond the usual commercial agreements are strong indicators of collective dominance. Symmetry typically refers to the symmetry of market shares and cost structures. The FCA has also assessed the nature of the product, i.e. whether product is homogenous or heterogeneous.

As regards factors increasing the likelihood of coordination, the FCA has referred in its decision practice to the competition law literature[788] and the judgments of the Union Courts[789] as well as the Commission's decision practice.[790] In the EU, several factors have been assessed to increase the likelihood of collective dominance.[791] Factors which form basic conditions and factors which increase the likelihood of coordination are, to some extent, interlinked. For example, barriers to entry are one of basic conditions and may increase the likelihood of coordination. However, the assessment as such does not seem to differ in these two contexts.

In the *Carlsberg/Orkla* case, the FCA examined internal and external competition. Factors that were assessed in the case were also aligned according to this division. This division is not commonly applied in merger cases but is more familiar in cases of abuse of a dominant position. However, the factors themselves are similar to those applied in merger cases.

In the *Alfons Håkans and Finntugs* case, the Competition Council assessed that the existence of collective dominance requires that that there is no sufficient competition among the members of an oligopoly and that external competition will not restrict the exercise of market power by them. As regards internal competition, the Council has discussed two situations. Firstly, coordination can be based on structural or other economic links between the members of an oligopoly. The situation may occur, among others, if there is a joint venture between the members of an oligopoly. Secondly, coordination can be based solely on the market structure without any economic links between the members of an oligopoly. Internal competition can be insufficient if the following market characteristics exist: few companies in the market, homogenous product and transparent prices. As regards external competition, the factors which the Council assessed are similar to those applied in the assessment of single

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[788] Hawk and Huser (1996); OECD Roundtable on Oligopoly, DAFFE/CLP (99)25; Jokinen (2002), p. 54.

[789] Case T-102/96 *Gencor v Commission*; Joined cases C-98/94 and C/30/95 *France and Others v Commission*; Jokinen (2002), p. 54.

[790] Case IV/M.1524 - *Airtours/First Choice*; Case IV/M.1016 - *Price Waterhouse/Coopers & Lybrand*; Jokinen (2002), p. 54.

[791] Jokinen (2002), p. 54.

dominance, i.e. market power is assessed with regard to the market positions of customers and competitors and is based on high market shares, lack of substitutes for customers and barriers to entry. In this judgment the Council made a reference to the judgments of the Union Courts.[792]

In the *Telia Finland/Sonera/Radiolinja* case, the Market Council assessed, among others, the following factors: excess capacity, technical development, symmetry of market shares and cost structures, barriers to entry and market transparency. The excess capacity was assessed to provide firms with a mechanism to punish a competitor who would start aggressive price competition. In this case excess capacity, however, did not relate to the market in which the alleged abuse took place. The Competition Council also stated that entry into the market would be possible, i.e. there were no barriers to entry. As regards market transparency, the Council stated that agreements between telecommunication operators were not public.

The Council considered that the assessment of collective dominance in cases of abuse of a dominant position should be distinguished from that of merger cases. In cases of abuse of a dominant position, the assessment of a dominant position must be based on factual evidence of coordinated conduct, not solely on the existence of factors which would increase the likelihood of collusion. According to the Council, the approach was in line with the judgments of the Union Courts. The Union Courts have based collective dominance in oligopolistic market structure only in merger cases. In cases of abuse of a dominant position, the Courts have required some links between the members of an oligopoly exist.

The Competition Council stated in this case that some of the factors in the market were conducive to collective dominance, whereas other elements indicated the contrary. According to the Council, Telia, the appelent, could not explain why coordination between Sonera and Radiolinja would be planned and conscious or that there would be significant structural links. The Council further stated that there was no vehicle for Sonera and Radiolinja to exchange information. The Council further stated that even if there were indicators of a collective dominant position, the market situation in its entirety does not support this indication. It should be noted that here the approach adopted by the Council was quite similar to that which was later adopted in the EU, i.e. assessment criteria should not be assessed separately in isolation of the markets. The Market Court concluded that

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[792] The Competition Council referred, e.g. to the following cases: Joined Cases C-68/94 and C 30/95 *France and Others v. Commission*; Case T-24/93 *Companie Maritime Belge v Commission*; Case T-228/97 *Irish Sugar v Commission* and Case T-102/96 *Gencor v Commission*.

Sonera and Radiolinja did not have collective dominance in the national market for access to telecommunication networks. The approach in which internal and external competition is assessed is very similar to the approach that was applied later in the *Carlsberg/Orkla* case.

In the Act of Competition Restrictions, the precedent of the Competition Act, Article 6, which prohibited the abuse of a dominant position, and Article 11d, which prohibited the creation or strengthening of a dominant position which significantly impeded competition both referred to a dominant position. However, the reference to a dominant position did not necessarily mean that the provisions would be interpreted in the same way. Similarly, in the EU the control of a dominant position, with the qualification of significant impediment to effective competition, under the old Merger Regulation operates differently from that of Article 102 TFEU, which concerns the abuse of a dominant position. As regards Articles 6 and 11d, a collective dominant position was primarily based on objective criteria in the structural market analysis. Under Article 6 a dominant position was a precondition for the abusive conduct, conduct which without such a position could be legitimate.

The assumption that the Finnish merger control provisions cover a collective market position derives from the Government Bill for the Act on Competition Restrictions of 1997. In fact, in the course of enacting the Act there was no discussion in Finland on whether collective dominance should be covered by the Competition Act or not. The interpretation of the scope of the Merger Regulation also affected the interpretation of the scope of the merger control provisions. Contrary to dominance test, the SIEC test does not require a dominant position to be established. The said position is only a single, albeit the most significant, example of significant impediment to effective competition.

In the following sections, the assessment criteria for coordinated effects and the development of the criteria in Finnish merger control are discussed in more detail and in the light of some merger cases.

5.5 Diversity Phase of Assessment

5.5.1 Basic Conditions for Coordination in Fritidsresor/Finnmatkat Case

The *Fritidsresor/Finnmatkat* case was the first merger case which was based on the finding of collective dominance. The FCA concluded that the merger would create a collective dominant position between Finnair plc (hereinafter Finnair)

and Fritidsresor Holding AB (hereinafter Fritidsresor) in the package tour market. In this case, there was an extensive discussion of the assessment criteria.[793] The FCA divided the factors to be assessed into basic conditions and factors increasing the likelihood of coordination.

The transaction concerned the acquisition whereby Finnair and Fritidsresor, part of the British Thomson Travel Group plc, agreed on the sales of the stock capital and the related business activities of Finnmatkat to Fritidsresor on 10 December 1999. The relevant product market consisted of foreign package holidays (FPH).[794] The geographical market was national.[795] After the merger, there would be three major tour operator groups in Finland: Finnair, the Thomson Group and the Airtours Group. Finnair would sell package tours under the brands of Aurinkomatkat, Top Club and Etumatkat. The Thomson Group would sell package tours in Finland under the brands of *Fritidsresor*, Hasse, Tema Tours and *Finnmatkat*. The Airtours Group would sell package tours under the brands of Tjäreborg and Spies. [796] Typically, package tours consist of flight, accommodation and other potential services at the resort.[797]

Both Fritidsresor and Finnair are vertically integrated firms. Fritidsresor is a tour operator which provides flight services through its own company Britannia Airways (hereinafter Britannia) and owns hotels at the holiday resorts. Finnair provides charter flights and scheduled flights services as well as tour operating and travel agent services. Prior to the merger, Finnair's market share in charter flights was [60-90]%[798] in 1998. After the proposed merger, the market share was assessed to increase to [80-100]%. However, Fritidsresor stated that it would not have any flights to Finland after spring 2000. Finnair's market share in the

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[793] Jokinen (2001), p. 53. Compare to factors of Case COMP/M.1524 - *Airtours/First Choice* and Case T-342/99 *Airtours v Commission*.

[794] *Fritidsresor/Finnmatkat*, Case No. 1976/81/99, p. 2. In its decision to open second phase proceedings the FCA stated that the relevant product market can further be divided into long-haul package holidays and package holidays to Europe and North-Africa. This type of division has also been discussed by the Commission in Case COMP/IV.1524 – *Airtours/First Choice*, para. 13. In addition, the FCA stated that package holidays can also be distinguished by holiday type, e.g. city breaks, beach holidays and skiing. See also Case COMP/IV.1524 – *Airtours/First Choice*, para. 10.

[795] Similarly, the Commission stated in Case COMP/IV.1524 – *Airtours/First Choice* that the markets for the supply of foreign package holidays are still essentially national in character. The Commission also refers to a number other cases with regards to these markets, see para 43.

[796] *Fritidsresor/Finnmatkat*, Case No. 1976/81/99, pp. 4-6; FCA Yearbook 2001, p. 29.

[797] Package tours are regulated by the Package Travel Act (1079/94), which, among other things, defines the notion of package tours.

[798] The exact market share is deleted from the public version of the decision and is replaced by a range in brackets.

market for travel agent services was [30-50]% and it had a 95% stake in Amadeus Finland Ltd, a company which provides booking services for most travel agents.[799]

As a part of the acquisition, Finnair and Fritidsresor concluded a cooperation agreement, i.e. Air Charter Agreement, under which Fritidsresor undertook to obtain the flights needed by Fritidsresor, Hasse, Tema Tours and Finnmatkat primarily from Finnair. The agreement concerns the flights between Finland and holiday resorts.[800] As regards basic conditions for coordination, the FCA assessed the following factors: the symmetry of leading operators in the markets, a cooperation agreement on flights, barriers to entry, ability to monitor and retaliation mechanism.

In its decision, the FCA stated that the merger would diminish the difference between the two leading operators, Finnair and Thomson Group, by increasing the symmetry between firms. As a result of the merger, Finnair and Thomson Group would have a market share of [20-40]% respectively, and the difference with the third major operator, Airtours Group, would be significant. In addition, other operators in the Finnish package tour market were much smaller. The FCA also stated explicitly that the symmetry of firms increases the likelihood of coordination. A small number of suppliers would cause every supplier having to take into account the actions of competitors and their potential reactions to its own actions.

The FCA also assessed the potential competitive effects of the Air Charter Agreement and stated that due to the Agreement all tour operators which belong to the Fritidsresor Group would primarily use Finnair's flights in a similar way to Finnmatkat. This was assessed to increase the symmetry of cost structures between firms and therewith to increase the likelihood of coordination. The Agreement would also provide Finnair with a vehicle to monitor the capacity plans of Fritidsresor.

The FCA stated that the agreement on flights led to strong ties between Finnair and the Thomson Group. As a result of the agreement, the cost structures of the companies were harmonised, which improved the harmonising possibilities of the operations.[801] The FCA stated that the interdependence would also result from the nature of the package tour market where it is particularly important to balance supply and demand in order to maximise the result. If the package tour

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[799] *Fritidsresor/Finnmatkat*, Case No. 1976/81/99, p. 3
[800] *Fritidsresor/Finnmatkat*, Case No. 1976/81/99, p. 2. FCA Yearbook 2001, p. 29.
[801] Jokinen (2002), p. 54.

cannot be sold at the proper time it loses its value [802] Mutual interdependence would also be increased by the cooperation between the members of an oligopoly in accommodation services.

The FCA considered that barriers to entry consisted, amongst others, of the Air Charter Agreement. The fact that tour operators in the Fritidsresor Group were bound to Finnair for a long time was assessed to decrease the number of charter airline customers and therewith decrease the entry to the market. The FCA also stated that entry was limited by the lack of suitable flight capacity and the customers' tendency to use the domestic airline. Also the guarantee required by the Act on the Arranging of Package Tours was found to limit the entry of small tour operators to Finland.[803] In addition, factors such as the requirement to build a distribution system, access to current distribution systems, the limited size of the market and low increase in demand were considered to increase the entry costs.

The FCA also assessed the ability of the members of an oligopoly to monitor market behaviour and capacity plans. The tour operating market was found to be transparent to the extent that the members of an oligopoly were able to detect deviations from the common behaviour. The tour operators, for example, published brochures with detailed information about the trips sold well before the start of the season. It was also possible to follow the price level of each season and indirectly the number of unsold trips from newspaper ads and the websites of travel agents and tour operators. In addition, the trade association published detailed supply statistics. Furthermore, the Amadeus reservation system also increased the market transparency. As a leading charter flight company, Finnair had the information about the flight capacity that is needed by all tour operators and of any changes in their needs. In addition, through its travel agents, Finnair was able to monitor the sales of each tour operator.[804] The members of an oligopoly could thus also detect deviations due to their simultaneous presence in different markets.

The FCA also assessed the ability of the members of an oligopoly to retaliate for any deviation from the coordinated behaviour. Finnair and Fritidsresor were found to be able to 'punish' each other, should the other party seek to appreciably increase its market share. A punishment mechanism consisted of the above-mentioned systems and links. In addition, the simultaneous presence of the

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[802] Jokinen (2002), p. 54.
[803] *Fritidsresor/Finnmatkat*, Case No. 1976/81/99, pp. 7-8; Jokinen (2002), p. 54.
[804] *Fritidsresor/Finnmatkat*, Case No. 1976/81/99, p. 8; Jokinen (2002), p. 55.

leading firms in a number of different markets provide them with the ability to gather information, increase mutual understanding and provide more opportunities to punish the deviator. As regards potential punishment mechanisms, the FCA stated that Finnair may limit flight capacity for Fritidsresor, and Fritidsresor may, for example, within the limit of the Air Charter Agreement, stop using Finnair's flight capacity. Retaliation may also consist of the ability to limit the flight slots.[805]

According to the FCA, factors which may increase the likelihood of collective dominance consist, for example, of market transparency, barriers to entry, small increase in demand, product homogeneity, the limited buyer power of the customers and the stability of market conditions.[806] Market transparency and barriers to entry were also discussed in the context of basic conditions. Market transparency consisted, for example, of the economic links between competitors and the exchange of information through trade associations. Tour operators were also able to follow each other's behaviour from published brochures, newspaper ads and the homepages of travel agents and tour operators. In addition, the agreements between Finnair and Fritidsresor provided an opportunity to follow each other's behaviour in detail. The FCA considered that market entry into the Finnish tour operating market was unlikely. The Finnish markets are rather small. Entry by a major European tour operator was considered to take place only through a merger.[807]

According to the FCA, package tours were homogenous products. Every tour consists of the flight and accommodation at the resort. As regards flights, the FCA stated that due to Finnair's position as a major airline company in Finland there were no differences in flights. The fact that there are differences between different hotels, but within the same price class differences, is not decisive for the purpose of assessing the competitive effects of the case. Market shares and demand were stable. Consumers, who are customers in the tour operating market, did not have significant buyer power and would not constrain the pricing behaviour by Fritidsresor and Finnair. Due to barriers to entry and small size of actual competitors, the pricing behaviour by Fritidsresor and Finnair would not be constrained by competitors. The FCA concluded that the combination of high market shares of Fritidsresor and Finnair and the agreement regarding flights, together with other factors would result in the creation of collective dominance

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[805] *Fritidsresor/Finnmatkat*, Case No. 1976/81/99, p. 9; Jokinen (2002), p. 55.
[806] *Fritidsresor/Finnmatkat*, Case No. 1976/81/99, pp. 8, 10; Jokinen (2002), p. 54.
[807] *Fritidsresor/Finnmatkat*, Case No. 1976/81/99, pp, 8, 10.

between Fritidsresor and Finnair in the Finnish package tour market.[808] Hence, Fritidsresor and Finnair were assessed to have the ability and incentive to coordinate their behaviour.

In the *Fritidsresor/Finnmatkat* case, the FCA assessed that the proposed remedies were sufficient to remove competition concerns deriving from collective dominance between Fritidsresor and Finnmatkat in the package tour market in Finland by removing the links between competitors. Firstly, Fritidsresor and Finnair committed to remove a provision which concerned their cooperation in bed buying from the Share Purchase Agreement. Secondly, Fritidsresor and Finnair committed to rephrasing the Air Charter Agreement so that the exclusive purchasing clause concerns only the need for flight seats that corresponds to the present capacity of Finnmatkat.[809] Thirdly, Fritidsresor and Finnair committed to limiting the period of validity of the Air Charter Agreement to [...][810] years, after which it can be renounced. The liability of Fritidsresor to acquire flight capacity that is compatible with the capacity requested by Finnmatkat will in any case be terminated after the expire of the [...] year validity period. Fourthly, Finnair also committed to treating tour operators on an equal basis,[811] i.e. to provide charter flights equally to all tour operators, in particular when there will be a shortage of capacity.

The FCA stated that due to the nature of the market and, in particular, access to information, Finnair and Fritidsresor could monitor each other's behaviour in the package tour market also in the future. This could not, as such, be addressed by remedies. However, the condition to withdraw from the exclusivity of the Air Charter Agreement enabled other parties to enter the Finnish charter flight market and the condition to limit the period of validity of the Air Charter Agreement to [...] years would enable other flight companies to compete, after a certain transition period, for the flight capacity requested by Finnmatkat.[812]

5.5.2 Internal and External Competition in *Carlsberg/Orkla* Case

The FCA also assessed collective dominance in the *Carlsberg/Orkla* case. Contrary to the *Fritidsresor/Finnmatkat* case, in which the FCA divided factors to be assessed into basic conditions and factors increasing the likelihood of

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[808] *Fritidsresor/Finnmatkat*, Case No. 1976/81/99, pp. 10-11; FCA Yearbook 2001, p. 29.
[809] FCA Yearbook 2001, p. 29.
[810] The information is deleted from the public version of the decision.
[811] *Fritidsresor/Finnmatkat*, Case No. 1976/81/99, p. 12; FCA Yearbook 2001, p. 29.
[812] *Fritidsresor/Finnmatkat*, Case No. 1976/81/99, p. 13; FCA Yearbook 2001, p. 29.

collective dominance, the FCA examined factors in this case in the light of internal and external competition.

As a result of the transaction, the brewery and soft drink businesses of Norwegian Orkla would have been transferred to Danish Carlsberg. Prior to the merger, Orkla had a joint control in the Baltic Bewerage Holding Ab (hereinafter BBH) with Hartwall. After the merger, Carlsberg would replace Orkla as a party to exercise joint control in BBH. BBH operates, for example, in Russia and in the Baltic countries. Carlsberg also controlled Sinebrychoff, which is the main competitor of Hartwall.[813] The FCA based the assessment of collective dominance on the incentives and the ability of Sinebrychoff and Hartwall to avoid mutual competition (i.e. internal competition) as well as on the limited chances of other market operators to replace the lack of competitive pressure between Sinebrychoff and Hartwall (i.e. external competition).

According to the FCA, tacit collusion on prices and the coordination of other market behaviour would result if each member of an oligopoly understands the effects of its decision in the market and the reactions of other members and if the members of an oligopoly are able to engage in uniform anti-competitive conduct. The FCA stated that Sinebrychoff and Hartwall had possibilities to engage in uniform anti-competitive conduct as well as incentives to refrain from fierce mutual competition. Collective dominance was also considered to be reinforced by ties between the Sinebrychoff Group and Hartwall through a joint venture, BBH, which operated in the Baltic countries. In addition, Orkla, Carlsberg's brewery business partner, had a considerable minority share in Hartwall.[814]

In its assessment of collective dominance between Sinebrychoff and Hartwall, the FCA took into account the following factors. The brewery market was concentrated. The combined market share of the merging parties was assessed to be [60-100]%. The product was homogenous, and the market transparent. There was also cooperation between producers in the form of, for example, the recycling of bottles. The production technology was mature and the level of innovation low. The costs structures between the producers were similar and there were high barriers to entry that included high sunk costs related to manufacture and distribution. There existed also strong brands and partially exclusive arrangements with the effect of tying some customers. The transaction also resulted in ties between Sinebrychoff and Hartwall and the companies met in several different markets. The demand in the beer market was inflexible, and

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[813] *Carlsberg/Orkla*, Case No. 574/81/00, p. 1-2, 4; Jokinen (2002), p. 55.
[814] *Carlsberg/Orkla*, Case No. 574/81/00, p. 7; Jokinen (2001), p. 55.

grew very slowly. Customers had only modest possibilities to use buyer power. The FCA stated that an economic link may consist of the mutual interdependence of a tight oligopoly when the members of an oligopoly can anticipate each other's behaviour and have strong incentives to coordinate their behaviour in the market, particularly in order to maximize joint profit by reducing output and increasing prices. The members of an oligopoly holding collective dominance are able to harmonise their behaviour in the market and to refrain from mutual competition and to act irrespectively of other competitors and customers.[815] It can be asked whether the understanding of mutual interdependence is enough to conclude for coordinated effects.

The FCA stated that the merged entity could not simultaneously do business in the market and co-operate with the leading Finnish brewery and soft drinks companies. Therefore, the merger would not have been accepted without cutting some of the links which were assessed to result in a collective dominant position. Firstly, Orkla committed to sell or enter into a binding agreement to sell its minority stake in Hartwall to a buyer or several buyers independent of Carlsberg and Orkla. The sale was required to place within [...], starting from the FCA's decision. The condition was considered acceptable if also other links would be cut between the major market players. The link between Orkla and Hartwall was one of many links and connections between the market players and was not the core of the competition concern.[816] The position of BBH in the market was assessed to be significant. The divestiture of Orkla's stake in Hartwall would, however, cut an important link between the major market players.[817]

Secondly, Carlsberg and Orkla committed not to use Orkla's stake in BBH in order to influence the activities of Hartwall or its position in the Finnish market.[818] Thirdly, Carlsberg committed, among others things, to placing persons to be representatives on the board and the management of Sinebrychoff different

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[815] *Carlsberg/Orkla*, Case No. 574/81/00, pp. 7-10; Jokinen (2001), p. 55.

[816] Competition concerns derived mainly from Carlsberg's stake in Sinebrychoff and the simultaneous joint control in BBH with Hartwall. *Carlsberg/Orkla*, Case No. 574/81/00, p. 26.

[817] This link was significant due to the provision in the share-holding agreement between the Hartwall Group and Pripps Ringes, which provided Orkla with an option to buy shares in a situation wherein the firm currently exercising control in Hartwall would sell its stake.

[818] As regards the decision-making process in BBH, Carlsberg undertook, in potential disagreement, not to prevent a decision being reached [with regard to certain commercially central matters] (the exact information is deleted from the public version of the decision) that would be supported by Hartwall, and undertook that potential matters in which Carlsberg disagreeds would be solved by a third party accepted by the FCA.

from those who would be placed in similar positions in BBH. According to the FCA, the members of an oligopoly will understand common interests on the basis of very discrete hints. Therefore, situations where a certain element has to be brought onto the board are rare. It is, however, clear that boards and meetings within the senior members of the management can act as forums for the exchange of information and discrete hints. The FCA assessed that together with the second condition, this conditions makes it more difficult for the members of an oligopoly to coordinate their competitive behaviour through BBH and to use BBH as a mechanism for punishment. Other remedies related, for example, to distribution agreement, licencing agreement and the reveal of sales information.[819]

The FCA stated that tacit collusion was significantly facilitated by the existence of a punishment mechanism. Consequently, the punishment mechanism that acts as a threat for a potential deviator was addressed by remedies. In this case, the central punishment mechanism consisted of BBH. Carlsberg was able to use BBH as a means of incentive for Hartwall to avoid effective competition with Sinebrychoff in the Finnish market. Carlsberg stated that its purpose was not to harm BBH and it was interested in additional incomes provided by BBH. However, the FCA considered that Carlsberg was not dependent on BBH in the way that Hartwall was. The condition targeted to the punishment mechanism was not, as such, sufficient to remove competition concerns, but, in combination with other remedies, it formed a part of the solution.[820]

The FCA concluded that the proposed remedies were sufficient to remove competition concerns that derived from collective dominance between Sinebrychoff and Hartwall. The FCA also ensured that the parties will comply with the proposed conditions by setting an independent trustee to monitor the compliance and by providing a condition which related to the divestiture of the shares in Sinebrychoff and the ownership in BBH.[821]

The decision was appealed by Carlsberg to the Competition Council and further to the Supreme Administrative Court. The objective of the appeal was the FCA's decision to refuse to abandon or change one of the remedies.[822] Carlsberg argued that the market conditions were changed with the effect that one of the remedies

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[819] *Carlsberg/Orkla*, Case No. 574/81/00, p. 26.
[820] *Carlsberg/Orkla*, Case No. 574/81/00, p. 28.
[821] *Carlsberg/Orkla*, Case No. 574/81/00, p. 29.
[822] The FCCA may, upon application, lift a condition attached to the implementation of a concentration or mitigate it, due to a significant change in the market conditions or another substantial cause.

could be abandoned or changed. In addition, Carlsberg also questioned whether the existence of a punishment mechanism is a necessary condition for finding a joint dominant position and, in the affirmative, whether the FCA has shown the mechanism to exist.

5.6 Formalisation Phase of Assessment

5.6.1 Development of Necessary Conditions in *Lännen Tehtaat/Avena* Case

When the *Lännen Tehtaat/Avena* case was investigated by the FCA, the three necessary conditions for coordination were already adopted by the Court of First Instance in the *Airtours v Commission* case. Even if the FCA applied the approach which it had adopted in the *Fritidsresor/Finnmatkat* case and, therewith, assessed the basic conditions and factors increasing the likelihood of collective dominance, the analysis was arguably moving towards the analysis adopted in the *Airtours v Commission* case. The FCA, for example, explicitly referred to the *Airtours v Commission* case, and the three conditions provided in the judgment can also be recognised in the FCA's decision.

The transaction concerned an acquisition of Avena Corporation (hereinafter Avena) by Lännen Tehtaat plc (hereinafter Lännen Tehtaat). The Avena Group also consisted, for example, of Suomen Rehu Ltd, a producer of industrial feed, and Avena Siilot Holding Ltd (hereinafter Avena Siilot), a company specialised in processing and storing grain.[823] The second phase proceeding was started due to the strong position of Suomen Rehu Oy (hereinafter Suomen Rehu) in the animal feed market in Finland. In addition, Avena Siilot had over 60% of the market for storage and stockpiling of imported and exported grain. As a result of the merger, sugar beet in Finland would have become the sole commodity of the merged entity and a dominant position would have been created in the market for the manufacture of mineral feed. In addition, the merger would have created collective dominance between the merged entity and Raisio Yhtymä plc (hereinafter Raisio), another strong industrial feed operator in the market for feed for cattle and pigs, where the combined market share of these two companies would be over 70%.[824]

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[823] *Lännen Tehtaat/Avena*, Case No. 389/81/2002, pp. 1-2; See FCA Yearbook 2003, p. 26.

[824] *Lännen Tehtaat/Avena*, Case No. 389/81/2002, p. 10; FCA Yearbook 2003, p. 26.

5.6.2 Basic Conditions for Coordination

The FCA stated that the merger would increase market concentration and thereby strengthen the already existing tight oligopoly in the feed markets in Finland. According to the FCA, the merged entity and Raisio formed a duopoly whose choices and behaviour would determine the market conditions. There were also links between the members of a duopoly. The FCA referred to its previous decisions where it had assessed the applicability of the Act on Competition Restrictions to collective dominance and where it discussed the features of that position.[825] The FCA referred also to the judgments of the Market Court in which the Court had assessed a collective dominant position in the cases of an abuse of a dominant position[826] as well as to the judgments of the Union Courts[827] and the decisions of the Commission.[828]

As regards basic conditions, the FCA stated that there was a tight oligopoly in the feed markets in Finland. The leading firms, Suomen Rehu and Raisio, had symmetrical market shares. The FCA recalled that symmetry of market shares increases the likelihood of coordination. The difference between the markets shares of the leading firms and their competitors was large. In the market for feed for cattle and pigs, Suomen Rehu had a market share of [35-50]% in 2001 and Raisio [30-45]%, whereas the competitors' market shares were [0-15]%. Consequently, the merger strengthened the already strong market positions of Suomen Rehu and Raisio and increased the difference between the merged entity and its competitors. Suomen Rehu and Raiso were also the leading firms in the market for mineral feed. Suomen Rehu's market share was [35-50]% and Raisio's [25-40]%. Compared to Suomen Rehu and Raisio, the competitors' market shares were very small. In the market for mineral feed, the merger was assessed to strengthen the already strong market positions of Suomen Rehu and Raisio. The FCA stated that, in particular, in the presence of a duopoly high market share

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[825] In this context the FCA referred to *Carlsberg/Orkla,* Case No. 573/81/00; *Fritidsresor/Finnmatkat,* Case No. 1976/81/99 and *Georgia-Pacific/Fort James*, Case No. 830/81/2000.

[826] *Lännen Tehtaat/Avena*, Case No. 389/81/2002, p. 13. See *Valio II*, Case No. 1/359/94; *Alfons Håkans and Finntugs*, Case No. 23/359/98 and *Telia Finland/Sonera/Radiolinja*, Case 22/690/2000.

[827] *Lännen Tehtaat/Avena*, Case No. 389/81/2002, p. 13. In this case the FCA referred to Case T-102 *Cencor v Commission*, Joined Cases C-98/94 and C-30/95 *France and Others v Commission*, and Case T-342/99 *Airtours v Commission*.

[828] *Lännen Tehtaat/Avena*, Case No. 389/81/2002, p. 13. The FCA referred to the Commission's decisions in Case IV/M.1313 - *Danish/Vestjyske Slagterier*, Case IV/M.1524 – *Airtours/First Choice*, Case IV/M.1383 – *Exxon/Mobil* and Case IV/M.1016 – *Price Waterhouse/Coopers & Lybrand*.

is a clear indication of a collective dominant position in the absence of opposite evidence.[829]

In addition, the cooperation in contract manufacturing would increase mutual interdependence between the members of an oligopoly. Lännen Rehu was a contract manufacturer for Raisio. Even if Raisio had recently launched its own mineral feed, the volume of its own production was clearly smaller compared to those manufactured by Lännen Rehu for Raisio. Contract manufacturing was also assessed to increase the exchange of information between the firms. Lännen Rehu, as a contract manufacturer, would have information about the content of the raw material of Raisio's mineral feed, production amounts, the capacity that is required for production, as well as any changes in these factors.[830]

The FCA argued that there were barriers to entry in the feed market, which consisted, among other things, of high entry costs. In order to operate in the feed market a firm has to have its own distribution system or access to an already established distribution system. In addition, large firms in the market also provide information services and have an extensive field organization. These all are factors that an entrant would need to establish. According to the FCA, barriers to entry also consisted of the capacity requirement. A supplier in the market must have sufficient capacity to satisfy the current demand. In addition, barriers to entry were considered to consist of high investment costs, well-known brands of major suppliers, marketing and sales resources, and barriers for customers to switch the supplier.[831]

The FCA stated that the markets were transparent. Due to the special characteristics of the market the main sources of information were farmers and farm stores. The merger would increase market transparency based on Lännen Tehtaat's acquisition of an interest of 35% in Avena Siilot. Even if Lännen Tehtaat's stake in Avena Siilot did not form a controlling interest, it still would have an opportunity to receive information about the storage capacity, purchases of raw material and the dates of purchases of other firms. Market transparency was further increased by the fact that the trade association published monthly reports on total feed sales for feed manufacturers.[832]

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[829] *Lännen Tehtaat/Avena*, Case No. 389/81/2002, pp. 13-14.

[830] *Lännen Tehtaat/Avena*, Case No. 389/81/2002, p. 14.

[831] *Lännen Tehtaat/Avena*, Case No. 389/81/2002, p. 14.

[832] *Lännen Tehtaat/Avena*, Case No. 389/81/2002, p. 14. Hence, transparency in the market was mainly caused by a third party, not members of an oligopoly. A question arises how transparency can be reduced by remedies in these cases and to what extent a third party could be addressed by any remedial actions.

The above-mentioned arrangements and links formed a mechanism through which the merged entity and Raisio were able to punish each other if one of them increased its market share by charging a price different from the mutually understood or agreed level. According to the FCA, Lännen Tehtaat's interest in Avena Siilot would provide the merged entity with an efficient punishment mechanism. As all storage capacity requested by Raisio does not concern feed, the punishment may also address markets other than feed. This simultaneous presence in several markets, i.e. multi-market contacts, provides an opportunity to receive additional information about competitors and would facilitate mutual understanding and provide several opportunities to punish the deviator. Raisio would, for example, have the ability to render its domestic beet cut supplies, affect the costs of contract manufacturing for mineral feed and the storage costs of exported raw material. The ability to detect deviations consisted of market transparency and simultaneous presence in different markets.[833]

5.6.3 Factors Increasing Likelihood of Coordination

One of the factors increasing the likelihood of coordination is the transparency of the feed markets. Transparency consists, for example, of the links with regard to contract manufacturing as well as the price information and other information available in the market. During its investigation, the FCA received evidence that almost every price change was followed by a counteraction by competitors within a few days. As a result, prices were harmonized in the market. The interest of Lännen Tehtaat in Avena Siilot was also considered to increase market transparency.[834]

The FCA also assessed that market entry was unlikely. The assessment was based on the following factors. Firstly, the capacity was sufficient to satisfy the current demand. Secondly, entry would require large and costly investments. Thirdly, the well-known brands of large manufacturers as well as their marketing and sales resources would effectively bind customers. Coordination was considered to be likely based on the following factors. Market shares and demand would remain stable. The majority of customers in the market consist of farmers, who, according to the market information, were reluctant to change supplier in the middle of the rearing of animals and, in particular, during so-called sensitive phases such as the high milk production phase. In addition, feeds were considered to be homogenous products. Product homogeneity which enables

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[833] *Lännen Tehtaat/Avena*, Case No. 389/81/2002, p. 15.
[834] *Lännen Tehtaat/Avena*, Case No. 389/81/2002, p. 15.

following the price level consists, among other things, of the production method and the raw material.[835]

The FCA stated that without remedies, the merger would have created a monopoly in the sugar beet market and a dominant position in mineral feed production in Finland. In addition, the merger would have led to a collective dominant position with Raisio, another dominant player in the animal feed industry, in industrial feed markets.[836] The merger was conditionally approved.

Lännen Tehtaat committed to giving up its plan of acquiring a 35% interest in Avena Siilot. Avena Siilot Holding Oy would be formed as a result of the division of Avena Oy. The condition meant that Avena Siilot Holding Oy would remain in the possession of the Finnish State, which would provide a separate condition for this purpose. The purpose of the remedy was to decrease the negative effects on competition and to decrease a competitor's dependence on the merged entity in their import of raw material for feed manufacturing. [837]

Lännen Tehtaat also committed to giving up its share in domestic beet cut. The rest of the beet cut will remain in the possession of a market player, independent of the merged entity. Lännen Tehtaat is able to compete on this "free quota" with other potential purchasers. Similarly to the *Carlsberg/Orkla* case, the merging parties provided also additional commitments in case originally proposed commitments were not fulfilled. The condition regarding sugar beet was imposed to ensure that sugar beet producers which were competing with the merged entity would not be dependent on the merged entity's purchases of their sugar beet. The purpose of the proposed remedy which prohibited Lännen Tehtaat's interest in Avena Siilot was to decrease the negative effects on competition and to decrease the competitor's dependence on the merged entity in their import of raw material for feed manufacturing.[838]

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[835] *Lännen Tehtaat/Avena*, Case No. 389/81/2002, pp. 15-16.
[836] *Lännen Tehtaat/Avena*, Case No. 389/81/2002, p. 18; FCA Yearbook 2003, p. 26.
[837] *Lännen Tehtaat/Avena*, Case No. 389/81/2002, p. 18; FCA Yearbook 2003, p. 26.
[838] *Lännen Tehtaat/Avena*, Case No. 389/81/2002, p. 18; FCA Yearbook 2003, p. 26.

5.7 Stabilisation Phase of Assessment

5.7.1 Necessary Conditions for Sustainability of Coordination in *NCC/Destia* Case

In the *NCC/Destia* case, NCC Roads Oy acquired the entire asphalt coating business of Destia Oy. The FCA concluded that the transaction would have created a collective dominant position between NCC and Lemminkäinen Infra Oy in the market for manufacture and sales of asphalt mass in the capital city region as a result of which competition would have been significantly impeded in this market. The FCA investigated the conditions for the sustainability of coordination[839] and explicitly applied the three necessary conditions adopted in the *Airtours v Commission* case. According to the FCA, there were a number of features in the market that were conducive for coordination. These consist, for example, of concentrated markets, product homogeneity, similar cost structures, market transparency, high barriers to entry, the threat of retaliation and multi-market contacts between market participants.[840] In order to address the competition concerns identified by the FCA, the parties proposed commitments. The FCA considered the proposed commitments to be insufficient and made a proposal to the Market Court to prohibit the merger.[841]

In line with the FCA's assessment, the Market Court also found that the commitments proposed by the NCC were insufficient. The *NCC/Destia* case was the first merger case in which the Market Court assessed joint dominance. Both the FCA and the Market Court based their assessment on the dominance test. The Market Court approved the merger on 2 November 2011.[842] The merging parties withdrew from the original transaction and concluded a new agreement which did not include Destia's fixed asphalt station in Tuusula region. The effects of a new merger were assessed under the SIEC test and the merger was approved by the FCA on 24 November 2011.[843]

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[839] *NCC Roads Oy/Destia Oy and Destia Kalusto Oy*, Case No. 249/14.00.10/2011, para 85 et seq. See also the FCA Press Release, "FCA Proposes prohibition of Merger between NCC and Destia", 5 August 2011.

[840] See also Leivo et al. (2011), p. 1405.

[841] *NCC Roads Oy/Destia Oy and Destia Kalusto Oy*, Case No. 249/14.00.10/2011, paras 3, 160.

[842] FCA Press Release (2011), "Market Court imposes strict conditions on the approval of NCC's Destia acquisition", 2 November 2011; FCA Press Release (2011), "FCA has no cause to appeal NCC decision by Market Court", 9 November 2011.

[843] FCA Press Release, "Acquisition of Destia by NCC Approved in its New Form", 24 November 2011.

According to the Market Court, the FCA had based its assessment of NCC's and Lemminkäinen's collective dominance solely on the interdependence between the members of an oligopoly and that it therefore had to investigate whether the conditions that relate to market transparency, sustainable coordination and the third party reactions were met.[844] The Market Court concluded that the merger would have resulted in a market structure that provided incentives for concerted activities between NCC and Lemminkäinen. This would lead into serious and long-lasting anti-competitive effects in the markets for asphalt mass and asphalt paving contracts.

5.7.2 Ability to Monitor

The Market Court stated that the market for asphalt mass in the capital city region was sufficiently transparent so that NCC and Lemminkäinen would be informed – sufficiently precisely and quickly - about the changes of the behaviour of another market player.[845] The Market Court based this assessment on factors such as the concentrated market structure, vertical integration, stability of the market for manufacture and sales of asphalt mass and product homogeneity.[846]

5.7.3 Deterrent Mechanism

In its proposal to the Market Court to prohibit the merger, the FCA stated, among other things, that both NCC and Lemminkäinen had excess capacity in the capital city region and in the regions nearby. If one of the firms deviated from the common policy, the other could get the market for itself by means of aggressive competition. Both NCC and Lemminkäinen were active in several markets and the multi-market contacts would provide them with the ability to punish each other also in other markets. In addition, the FCA stated that deviation from the common policy in the market for asphalt mass could lead to significant loss and could, in itself, be a disincentive for deviating.

The Market Court considered that for coordination to be sustainable, factors others than the deterrence mechanism would more likely form an incentive not to deviate from coordination. The Court, for example, emphasised the fact that as

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[844] *NCC Roads Oy, Destia Oy and Destia Kalusto Oy*, Case No. 499/11/KR, 2 November 2011, para. 227.

[845] *NCC Roads Oy, Destia Oy and Destia Kalusto Oy*, Case No. 499/11/KR, 2 November 2011, para. 235.

[846] *NCC Roads Oy, Destia Oy and Destia Kalusto Oy*, Case No. 499/11/KR, 2 November 2011, paras 230-231.

a result of the merger NCC and Lemminkäinen would be the only vertically integrated firms in the market.[847] It should be noted that deterrent mechanism is usually considered a key criterion for coordination to be sustainable. This can be seen, for example, in the Finnish Merger Guidelines[848], the EU Horizontal Guidelines[849], and the case law of the Union Courts[850] as well as the economic literature. The Court of First Instance stated, for example, in the *Impala v Commission* case that: "It follows from the case-law that in order for a situation of collusive dominant position to be viable, there must be adequate deterrents to ensure that there is a long-term incentive in not departing from the common policy".[851]

5.7.4 Inability of Third Parties to Jeopardise Collusive Outcome

In line with the FCA's proposal to prohibit the merger, the Court also held that in this case foreseeable reactions by competitors and customers would not jeopardize the results expected of the coordination. The Market Court stated that barriers to entry would hinder a quick and large scale entry that would constrain the use of market power by the members of an oligopoly. [852]

The FCA concluded that remedies proposed by the NCC did not eliminate the anti-competitive effects of the merger. The FCA stated that the requested remedy should be structural in nature. As a result of the merger, the number of manufacturers in the asphalt mass market in the capital city region would have been reduced from three to two. The FCA viewed that the divestiture package should have included an asphalt mixing plant. However, NCC would not divest its asphalt mixing plant located in Vantaa. As a result of the merger, NCC would receive Destia's asphalt mixing plant located in Tuusula. However, divestiture of the Tuusula plant would have required cooperation by the seller in the form of leasing the site. The merging parties did not want to propose a divestiture package with a divesture of the Tuusula plant. Instead, the parties proposed to sub-lease the Nikkilä site located in Sipoo. The FCA concluded that this was the only structural part of the proposed commitments and that, based on the FCA's

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[847] *NCC Roads Oy, Destia Oy and Destia Kalusto Oy*, Case No. 499/11/KR, 2 November 2011, para. 242.
[848] Finnish Merger Guidelines, p. 77.
[849] EU Horizontal Merger Guidelines, para. 52.
[850] Case T-342/99 *Airtours v Commission*, para. 62.
[851] See Case T-464/04 *Impala v Commission*, para 465.
[852] *NCC Roads Oy, Destia Oy and Destia Kalusto Oy*, Case No. 499/11/KR, 2 November 2011, para. 264.

investigation, it was insufficient to address competition concerns.[853] The Nikkilä site was not considered an attractive object for a lease. The Market Court finally approved the merger on conditions.

[853] *NCC Roads Oy/Destia Oy and Destia Kalusto Oy*, Case No. 249/14.00.10/2011, paras 135, 142, 149-150.

6 CONCLUSIONS

The study aims to provide answers to the questions that arise from the assessment of mergers in oligopolistic markets. The key question – in light of the interregulation – is to what extent the development of Finnish merger control follows development in the EU. Other questions have also been posed throughout the study. What types of assessment criteria are decisive for coordination to exist? What other conditions – beyond the three necessary conditions adopted in the *Airtours v Commission* case – must be fulfilled in order to conclude that the merger results in coordinated effects? Are there core criteria – criteria that remain unchangeable throughout different eras – that can be identified? Is the division between different types of criteria of relevance? And finally, does an approach adopted in case practice confirm, complement or change an approach adopted in the previous practice?

As regards the question of interregulation, the study shows that EU merger control has significantly influenced the interpretation and enforcement of the Finnish merger provisions. The development of EU merger control can be seen in the decision practice and case law in Finland. The adoption of the three necessary conditions in the *Airtours v Commission* case is clearly seen in Finland, first implicitly in the *Lännen Tehtaat/Avena* case and then explicitly in the *NCC/Destia* case. In addition to the three necessary conditions, the FCA has stated in its decision practice, for example, that in the presence of a duopoly high market share is a clear indication of collective dominance. These factors can be listed as decisive factors for establishing coordinated effects. The influence of EU merger control on Finnish merger control is also established in the legislative history, where the Government Bill explicitly requests the FCA to seek guidance on EU competition law. Interregulation, however, may not need to be identical. Despite certain national variations, the outcome, however, may be very similar. This was seen, for example, with regard to the categorisation of necessary conditions for coordination in the Finnish Merger Guidelines and the EU Horizontal Merger Guidelines.

In the EU, the assessment of coordinated effects has been developed from a checklist approach to the discussion of links and further to the stabilisation of the three necessary conditions. In the *Nestlé/Perrier* decision, the Commission assessed a number of different factors and arguably applied a checklist approach. The focus of the analysis was on market characteristics conducive to coordination. In the *Kali und Salz/MdK/Treuhand* case, the Commission mainly

relied on structural links. In the *Gencor v Commisson* case, the Court stated that collective dominance required economic links.[854]

The Court of First Instance's judgment in the *Airtours v Commission* case provided a substantial development in the assessment of tacit collusion. The Court rejected the application of a checklist approach and set out three necessary conditions, i.e. the ability to monitor, deterrent mechanism and the inability of third parties to jeopardise the collusive outcome. The approach was more dynamic and looked at the sustainability of tacit collusion.[855] The same approach was also applied in the *Sony/BMG v Impala* and *ABF/GBI Business* cases. The *Sony/BMG v Impala* case provided the next substantial development for the assessment of coordinated effects. In this judgment the Court of Justice stated that in applying the criteria adopted in the *Airtour v Commission* case it is necessary to avoid a mechanical approach involving a separate verification of each of the criteria taken in isolation, while taking no account of the overall economic mechanism of a hypothetical tacit coordination. Hence, the emphasis of the assessment should be on the mechanism of a hypothetical tacit coordination.

After the adoption of the three necessary conditions in the *Airtours v Commission* case, the assessment criteria have also been presented in a more systematised way in Finland and aligned with the criteria provided in the case. In the *NCC/Destia* case, the assessment criteria were explicitly aligned with the criteria adopted in the *Airtours v Commission* case. The same type of systematised approach was already applied in the *Fridtidsresor/Finnmatkat* and *Lännen Tehtaat/Avena* cases, although the assessment criteria were divided into basic conditions and the factors increasing the likelihood of collective dominance. The *Fridtidsresor/Finnmatkat* case was the first in which the FCA assessed a collective dominant position in a merger case. The *Lännen Tehtaat/Avena* case was the first in which the FCA applied the necessary conditions adopted in the *Airtours v Commission* case even if the division of factors followed the earlier approach adopted in the *Fridtidsresor/Finnmatkat* case. After the *Fridtidsresor/Finnmatkat* case and prior to the *Lännen Tehtaat/Avena* case, the FCA made a decision in the *Carlsberg/Orkla* case and adopted a different approach to the above-mentioned cases. In this case, the FCA applied a checklist approach, which was familiar from the *Nestlé/Perrier* and *Gencor/Lonrho* cases,

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[854] In Case IV/M.619 *Gencor/Lonrho* case, the Commission relied – in the absence of structural links – on factors such as product homogeneity, market transparency and increased symmetry. Amelio et al. (2009), p. 92.

[855] Amelio et al. (2009), p. 92.

as well as the *France and Others v Commission* and the *Gencor v Commission* cases in EU merger control. The *Carlsberg/Orkla* case is also an example of the development of the assessment criteria in national case practice not necessarily following straightforwardly the development in EU merger control.

The three necessary conditions adopted in the *Airtours v Commission* case were further developed in the EU Horizontal Merger Guidelines. The wording of the EU Horizontal Merger Guidelines was later incorporated into the Finnish Merger Guidelines. Compared to the original wording of the *Airtours v Commission* case, the EU Horizontal Merger Guidelines have an additional statement according to which "coordination is more likely to emerge in markets where it is relatively easy to reach a common understanding on the terms of coordination". This statement is not explicitly provided in the *Airtours v Commission* case.[856] Instead, the Court refers to the awareness of common interest of the members of an oligopoly and the possibility to "adopt on a lasting basis a common policy on the market with the aim of selling at above competitive prices."[857] The Finnish Merger Guidelines refer to the possibility to "easily arrive at a common perception as to how coordination should work".[858] When examining the wording of the EU Horizontal Merger Guidelines and the Finnish Merger Guidelines, it could be argued that the possibility to reach the terms of coordination is another necessary condition or a type of precondition for the three necessary conditions and any other conditions that are required for coordinated effects to exist. In the competition law literature, the possibility to reach the terms of coordination is also interpreted as "a fourth condition" for coordination to exist.

In the EU Horizontal Merger Guidelines, the statement which concerns the possibility to reach the terms of coordination is followed by the three necessary conditions adopted in the *Airtours v Commission* case. The EU Horizontal Merger Guidelines state firstly that "coordinating firms must be able to monitor to a sufficient degree whether the terms of coordination are being adhered to". The Guidelines state further that the markets need to be "sufficient transparent to allow coordinating firms to monitor to a sufficient degree whether other firms are deviating, and thus know when to retaliate". Secondly, the Guidelines state that "discipline requires that there is some form of credible deterrent mechanism that can be activated if deviation is detected". According to the Guidelines, the deterrent mechanism must be sufficiently severe, credible and certain. The

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[856] Case T-342/99 *Airtours v Commission*, para. 61; EU Horizontal Merger Guidelines, para. 41.
[857] Case T-342/99 *Airtours v Commission*, para. 61.
[858] Finnish Merger Guidelines, p. 76.

Guidelines also provide certain examples of the deterrent mechanism such as the cancellation of joint ventures. Thirdly, the Guidelines state that "the reactions of outsiders, such as current and future competitors not participating in the coordination, as well as customers, should not be able to jeopardise the results expected from the coordination".[859] These necessary criteria are worded similarly in the Finnish Merger Guidelines.

However, it should be noted that contrary to the *Airtours v Commission* case the EU Horizontal Merger Guidelines state that the "three conditions are necessary for coordination to be *sustainable*",[860] whereas the Court states that "three conditions are necessary for a finding of collective dominance". In the *Airtours v Commission* case, the *sustainability* criterion is only referred to in the context of deterrent mechanism. The Court states that "tacit coordination must be sustainable over time".[861] Both the EU Horizontal Merger Guidelines and the Finnish Merger Guidelines combine the possibility of reaching the terms of coordination and the three necessary criteria by stating that the competition authority would examine "whether it would be possible to reach the terms of coordination and whether the coordination is likely to be sustainable".[862] The ability to reach the terms of coordination can be considered as a fourth - and also arguably necessary - condition.[863]

Neither the EU Horizontal Merger Guidelines, the Finnish Merger Guidelines, nor the *Airtours v Commission* case explicitly state whether the three necessary conditions for coordination are sufficient. The established approach is that the conditions are cumulative[864] but that they are not sufficient. The Finnish Merger Guidelines only state that the list of factors that can increase the likelihood of coordination or make coordination easier or more stable is not exhaustive and that all factors need not be present. The Guidelines also state that taken separately the factors are not necessarily decisive.[865]

It could be asked whether the three necessary conditions were determinant in the EU merger control even prior to the *Airtours v Commission* case. In the light of the cases discussed in this study the same conditions can also be identified in earlier decisions. For example, the deterrent mechanism was discussed in the

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[859] EU Horizontal Merger Guidelines, paras 41, 49, 52, 55.
[860] EU Horizontal Merger Guidelines, para. 41.
[861] Case T-342/99 *Airtours v Commission*, para. 62.
[862] EU Horizontal Merger Guidelines, para. 42; Finnish Merger Guidelines, p. 76.
[863] Amelio et al. (2009), p. 92.
[864] See, e.g. Amelio et al. (2009), p. 92.
[865] Finnish Merger Guidelines, pp. 77-78.

Gencor v Commission case where the Court of First Instance stated that a highly competitive action, such as a price cut, in order to increase a market share would provoke identical actions by other members of an oligopoly. The reactions of third parties were assessed, for example, in the *Nestlé/Perrier* case, where the Commission took into account that the reactions by outsiders were limited and could not jeopardise the coordinated outcome. The question of which other conditions were decisive cannot be answered. However, factors which contribute to the necessary conditions, such as the market transparency, homogenous product and symmetry of firms were assessed in almost all cases discussed in this study.

In the *Sony/BMG v Impala* case, the Court of Justice stated that in applying the criteria adopted in the *Airtour v Commission* case it is necessary to avoid a mechanical approach involving a separate verification of each of the criteria taken in isolation, while taking no account of the overall economic mechanism of a hypothetical tacit coordination. Hence, the effects of the merger should be assessed in view of the mechanism of a hypothetical tacit coordination. In the *Sony/BMG v Impala* case the Court of Justice adopted language which was closer to the EU Horizontal Merger Guidelines and slightly different from the language provided in the *Airtours v Commission* case and puts more emphasis on the ability to reach a common understanding on the terms of coordination. It seems that the language in the EU Horizontal Merger Guidelines prevails over the language of the *Airtours v Commission* case. Hence, the EU Horizontal Merger Guidelines and the *Sony/BMG v Impala* case complement the three necessary conditions adopted in the *Airtours v Commission* case.[866]

The Finnish Merger Guidelines state that the "three conditions are usually necessary for coordination to be considered possible or more likely".[867] Contrary to the EU Horizontal Merger Guidelines, the Finnish Merger Guidelines combine the possibility to reach the terms of coordination – articulated in the Guidelines as the possibility to "easily arrive at a common perception as to how coordination should work" - and the ability to monitor as one condition. Similar to the EU Horizontal Merger Guidelines, the second condition in the Finnish Merger

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[866] It should be noted that the Commission has stated in the Commission XXIVth Report on Competition Policy 1994, p. 152 that the focus of the analysis is on the particular combination of factors that determine how competition takes place in the market, not on the presence of certain individual factors. The Commission has also referred to the necessary to make an overall assessment rather than mechanistically applying characteristic in a "checklist".

[867] Finnish Merger Guidelines, p. 76. As stated before, the Finnish language version of the Guidelines state that "for coordination to be successful or more likely the following is usually presumed". See the Finnish language version of the Guidelines, p. 76.

Guidelines is deterrent mechanism and the third condition is the inability of third parties to jeopardise the collusive outcome.[868] All these conditions are combined with the sustainability criterion. Whether the sustainability criterion refers to all three conditions or only to a single condition is not, in practice, of relevance. In any case, all three conditions are necessary for coordination to exist and they all have to be proven.

As regards the possibility to reach the terms of coordination, the Guidelines provide examples of the market characteristics which make coordination easier such as simple and stable economic environment, small number of players, homogenous product, stable demand and supply conditions, symmetry of firms and structural links. The Guidelines also state that firms may find ways to overcome complex economic environment, for example, by establishing pricing rules.[869] Similarly, in Finland the FCA, and later the FCCA, has taken into account factors that are similar to the three necessary conditions for the sustainability of coordination even prior to the *Airtours v Commission* case. For example, the FCA has assessed the deterrent mechanism in the *Fritidsresor/Finnmatka* and *Carlsberg/Orkla* cases.

In its early decisions the FCA did not explicitly refer to the ability of third parties to jeopardise the outcome of coordinated effects. However, the FCA referred to the ability of competitors to constrain the ability of incumbents to act independently from other market participants. This reference was made, for example, in the *Carlsberg/Orkla* and *Fritidsresor/Finnmatkat* cases. In the *Carlsberg/Orkla* case, the FCA stated that the members of an oligopoly were able to refrain from competition and to act irrespectively of competitors and customers. In the *Fritidsresor/Finnmatkat* case, the FCA assessed that the actual competitors were not in a position to constrain the behaviour of the members of an oligopoly. In addition, the buyer power was assessed by the FCA in the *Fritidsresor/Finnmatkat* and *Carlsberg/Orkla* cases.

As regards the relevancy of the division between the three necessary conditions and other conditions, the three necessary conditions provide the competition authority with a clear structure for the assessment of coordinated effects: certain conditions must be fulfilled in order to conclude that a merger will result in coordinated effects. Hence, the three necessary conditions provide a tool for the competition authority to identify cases which are prone to coordination and subject to a more detailed investigation. In addition, the three necessary

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[868] Finnish Merger Guidelines, pp. 76-77.
[869] EU Horizontal Merger Guidelines, paras 44-48.

conditions form "obligatory" criteria for coordinated effects to exist and, hence, minimum criteria for these effects. In other words, if one of the conditions is not fulfilled a merger may not result in coordinated effects. It cannot be assumed that a number of other factors, either structural factors in the market or factors resulting from the conduct of the members of an oligopoly, could replace one of the necessary conditions that is not fulfilled.

However, it is more difficult to conclude what other factors are decisive in the merger assessment and how many of them have to be present in order to conclude that a merger would result in coordinated effects. This problem derives from the fact that the three necessary conditions adopted in the *Airtours v Commission* case are not considered to be sufficient: something else is needed to be proven. Among the factors which are present in almost all of the cases discussed in this study are market concentration, market transparency, homogenous products and the symmetry of firms. However, a number of these factors contribute to the three necessary conditions and they will be taken into account in the assessment in that role, not necessarily as an independent factor. For example, a factor such as market transparency or homogenous product may also contribute to the ability of the members of an oligopoly to monitor each other.

The guidance provided by the Court in the *Airtours v Commission* case does not seem to lose its relevance even if the substantive test is changed, as was seen in EU merger control and later in Finnish merger control. It could be asked what makes this guidance sustainable. The three necessary conditions adopted in the *Airtours v Commission* case arguably derive from the 1992 US Horizontal Merger Guidelines and from the assumptions provided by economics. Hence, these sources arguably form an actual source for the conditions and the reason that the same conditions – although not always presented together or provided with the same emphasis – can be identified throughout different eras of merger control. In other words, the guidance for the assessment criteria has also "back-ups" other than the *Airtours v Commission* case.

As regards the future of the assessment of coordinated effects, the three necessary conditions adopted in the *Airtours v Commission* case will arguably remain as the main criteria. It is not likely that the FCCA or any other competition authority would withdraw from the logic of the Court's judgment. As stated above, the origin of the three necessary conditions lies in the 1992 US Horizontal Merger Guidelines and in economics. It could be asked, however, what happens in the case of changes in the actual source of the three necessary criteria? The US Department of Justice and the Federal Trade Commission

adopted the revised US Horizontal Merger Guidelines in 2010, which replaced the 1992 US Horizontal Merger Guidelines and also slightly changed the assessment criteria for coordinated effects. It could be asked whether these changes are decisive and whether they will affect the assessment criteria in EU merger control and, therewith, in Finnish merger control. So far, the European Commission and the FCCA have applied the criteria adopted in the *Airtours v Commission* case.

In Finland, it is presumed that factors that were applied in the *NCC/Destia* case, and even earlier in the *Lännen Tehtaat/Avena* and *Fritidsresor/Finnmatkat* cases, would prevail. As can be seen in the *NCC/Destia* case, the factors assessed were termed and categorised in line with the *Airtours v Commission* case and the EU Horizontal Merger Guidelines. The same factors which were previously termed basic conditions were now in the *NCC/Destia* case termed the three necessary conditions. The Market Court, however, explicitly stated in the *NCC/Destia* case that for coordination to be sustainable, factors other than the deterrence mechanism would more likely form an incentive not to deviate from coordination. It is not clear whether this is an attempt to follow the guidance provided by the Court of Justice in the *Sony/BMG v Impala* case in which the Court stated that in applying the criteria adopted in the *Airtour v Commision* case it is necessary to avoid a mechanical approach which would involve a separate verification of each criteria taken in isolation, while not taking into account the overall economic mechanism of hypothetical tacit coordination. Hence, the effects of the merger should be assessed in view of the mechanism of a hypothetical tacit coordination. The statement of the Market Court in the *NCC/Destia* case does not mean that the Court would abandon the retaliation mechanism as a necessary condition.

It is presumed that under the SIEC test the role of economic analysis in the merger assessment will also be increased in Finland in the same way it has happened in the EU. The Finnish Merger Guidelines refer to the use of different types of analysis, including econometric data, applied in the merger assessment, without explicitly mentioning any particular tool for assessing non-coordinated effects such as the UPP test.

In light of the merger cases discussed in this study, remedies in Finnish merger control have been very similar to those in EU merger control. Remedies have been targeted on structural features of the market, such as divestitures. However, a number of remedies have been targeted on behavioural factors, such as not providing information to competitors. In certain cases, remedies were targeted on both structural and behavioural factors in the same merger. In those cases, in

which remedies are targeted solely on the structural factors of the market, it could be argued that a certain structure - in line with the SCP approach – is seen as a precondition to conduct. In other words, by affecting the structure of the market by remedies, certain conduct can be achieved. The current approach indicates, however, that in oligopolistic markets both structural and behavioural factors are important. This is seen in those cases in which remedies were targeted on both structural and behavioural factors.

It is not possible to definitively conclude what conditions have to be fulfilled in each case in order to conclude that a merger would result in coordinated effects. The European Commission as well as the FCCA applies the three necessary conditions adopted in the *Airtours v Commission* case. In addition, both authorities apply the additional condition of reaching the terms of coordination. However, these conditions may not be sufficient for establishing coordinated effects: some other conditions may need to be fulfilled. Some of the factors are interlinked, i.e. a factor that contributes to the ability to monitor, such as market transparency, will also increase the possibility to reach the terms of coordination or, in general, increase the likelihood of coordination.

So far, the criteria adopted in the *Airtours v Commission* case have prevailed and formed a structure for the analysis. It will be seen what the effects of the *Sony/BMG v Impala* case will be, for both Finnish and EU merger controls. On the one hand, the Court of Justice seems to confirm the criteria adopted in the *Airtours v Commission* case, as it explicitly states that the criteria adopted in the *Sony/BMG v Impala* case are not incompatible with the criteria adopted in the *Airtours v Commission* case. On the other hand, the Court stated that in applying the criteria adopted in the *Airtour v Commission* case it is necessary to avoid a mechanical approach involving a separate verification of each of the criteria taken in isolation, while not taking into account the overall economic mechanism of a hypothetical tacit coordination. Hence, the Court seems to complement the *Airtours v Commission* case.

It could be asked if, as a result of the guidance provided in the *Sony/BMG v Impala* case, some of the criteria adopted in the *Airtours v Commission* case need not be verified any longer, and, if so, is it still be possible refer them as necessary conditions for coordination. Another question that remains is what it is exactly meant by the mechanism of a hypothetical tacit coordination.

There might be room for other conditions in the assessment. Firstly, both the European Commission and the FCCA have certain discretion.[870] Secondly, the competition authorities will take into account the specific characteristics of markets. Thirdly, the assessment of the effects of a merger on competition is prospective in its nature. As stated in the *Airtours v Commission* case, a close examination is required "in particular of the circumstances which, in each individual case, are relevant for assessing the effects of concentration in the reference market".[871] All these factors may affect the outcome of the analysis and the guidance that is given to future merger cases.

However, it can be concluded that Finnish merger control has followed the development in EU merger control. Even if all the nuances of the development in EU merger control that were seen, for example, in the *Sony/BMG v Impala* case cannot be identified in Finnish merger control, the general line of the development is identifiable and is an example of interregulation with regard to the EU and a member state.

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[870] Case T-342/99 *Airtours v Commission*, para. 64.

[871] Case T-342/99 *Airtours v Commission*, para. 63. See also Joined Cases C-68/94 and C-30/95 *France and Others v Commission*, para. 222.

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